Supreme Court, U.S.
FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-2117
No.

IN THE
Supreme Court of the United States
OCTOBER TERM 1988

INCOME SECURITY CORPORATION, INC., and GARY FELTON,
Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the "as expressly authorized" exception to the Anti-Injunction Act authorizes a federal district court to enjoin the prosecution of a previously filed state court suit and declare the purported state law causes of action therein asserted preempted by the Employee Retirement Income Security Act of 1974.

PARTIES TO THE PROCEEDING

Income Security Corporation, Inc.

Gary W. Felton

The Louisiana Oilfield Contractors Association, Inc.

The Louisiana Oilfield Contractors Association, Inc. Employee Benefit Trust

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LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Income Security Corporation, Inc., and Gary Felton, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on March 22, 1989, and to affirm the judgment of the United States District Court for the Western District of Louisiana entered on June 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported in an official reporter. It appears in the Appendix ["App."] at 1a to 3a. The Order of the United States District Court for the Western District of Louisiana staying state court proceedings, in part based on exclusive federal jurisdiction and preemption of state law causes of action, is not reported in an official reporter [but is reported in 9 EBC 1701 (W.D. La. 1987)]. The Order appears in the Appendix at 4a to 42a. Likewise, the Ruling of the District Court for the Western District of Louisiana, granting plaintiffs' motion for summary judgment on the ground of ERISA's limitation of actions, is not reported in an official reporter [but is reported in 9 EBC 2478 (W.D. La. 1988)]. The Ruling appears in the Appendix at 43a to 54a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 22, 1989. App. at 108a. Respondents' Petition for Rehearing was denied by the Fifth Circuit on April 27, 1989. App. at 109a-110a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974 ["ERISA"] § 2, 29 U.S.C. § 1001 (1982), provides in part:

> (a) The Congress finds that . . . employee benefit plans . . . are affected with a national public interest; . . . substantially affect the revenues of the United States . . . ; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the

equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 502, 29 U.S.C. § 1132 (1982), provides in pertinent part:

(a) A civil action may be brought —

. . .

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

(e)(1) Except for actions under subsection (a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)] of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. . . .

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) [29 U.S.C. § 1132(a)] of this section in any action.

ERISA § 514, 29 U.S.C. § 1144 (1982), provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .
>
> (b) . . .
>
> (2)(A)Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.
> (B)Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for any purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

The Anti-Injunction Act, 28 U.S.C. § 2283 (1982), provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 1331 (1982) provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

Petitioner Income Security Corporation, Inc., is a provider of contract administrative claims services to employee group health plans. Its president is Petitioner Gary Felton. Petitioners are hereinafter collectively referred to as "ISC".

Respondent Louisiana Oilfield Contractors Association, Inc. ["LOCA"], is an incorporated association of employers generally connected with the oilfield industry. LOCA established Respondent Louisiana Oilfield Contractors Association, Inc. Employee Benefit Trust to supervise its group health benefit plan [the "Plan" or "LOCA Plan"], which provided benefits for the employees and dependents of its member companies. Coverage under the Plan began on October 1, 1981. LOCA contracted with ISC for the latter to perform claims and other administrative services as a fiduciary for the Plan.

The Plan provided timely payment of benefits to its participants into the latter half of the second plan year, when financial problems arose. In mid-May, 1983, the Plan's accountant wrote to each trustee stating that the Plan carried a large deficit

because it was substantially underfunded. In May and June, 1983, the Plan's trustees met on several occasions, and kept detailed minutes of their proceedings. During these meetings the Plan's trustees attributed the Plan's funding deficiencies to ISC. They also determined to replace ISC as the Plan's claims services provider.

In February, 1984, LOCA and the Plan commenced a civil action in the state district court for Lafayette Parish, Louisiana, against ISC, Felton and others. In their state court action LOCA and the Plan sought to recover extra-contractual and punitive damages on the theory that the Plan's financial problems were caused, at least in part, by ISC's failure to provide for adequate Plan funding. LOCA and the Plan alleged that ISC failed to charge a sufficient amount to LOCA's member companies to cover the health benefits paid to participants in the Plan and the expenses incurred by the Plan for its administration.

After two years of discovery by all parties, LOCA and the Plan amended their state court complaint against ISC, Felton and others in February, 1986, to re-allege state law causes of action, including breach of contract, negligence and other tortious conduct. The amended complaint also clearly stated claims against ISC, Felton and others for breach of their several fiduciary duties under ERISA.

On July 29, 1986, ISC commenced this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq. (1982), ERISA § 501(a)(2), 29 U.S.C. § 1132(a)(2) (1982), and 28 U.S.C. § 1331 (1982), to have the federal district court declare all rights and legal relations of the parties in the state court action, and to stay all further state court proceedings.[1]

[1]Following oral arguments by all counsel on Petitioners' motion to stay state court proceedings, but before entry of the district court's order dated September 28, 1987, staying the same, App. 4a, Respondents' moved

On September 28, 1987, the district court held that it had exclusive subject matter jurisdiction over all claims brought under ERISA, App. at 40a, and that the state law causes of action asserted by LOCA and the Plan were preempted by ERISA, App. at 32a. Based on these holdings, the district court stayed all further state court proceedings. App. at 41a.

Subsequent to the entry of the district court's September 28, 1987 order, ISC and Felton moved for summary judgment as to all claims by LOCA and the Plan on the grounds that LOCA and the Plan failed to state a claim upon which relief could be granted and that the claims by LOCA and the Plan were barred by ERISA's limitation of actions, ERISA § 413, 29 U.S.C. § 1113 (1982). On June 8, 1988, the district court granted plaintiffs' motion for summary judgment, ruling that the claims by LOCA and the Plan were time-barred. App. 53a. LOCA and the Plan appealed to the Court of Appeals for the Fifth Circuit.

On appeal, the Fifth Circuit observed that the district court had *correctly* ruled that it had exclusive federal jurisdiction and that LOCA's claims were time-barred. However, the Fifth Circuit was unable to affirm the district court's judgment, citing as its sole authority its en banc decision in *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3704 (U.S. Apr. 24, 1989) (No. 88-1295).

In *Jackson* the Fifth Circuit had found that the Longshoremen's and Harbor Workers' Compensation Act

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for, and were granted, leave to amend their state court pleadings by deleting all references to ERISA. *But see Hutchinson v. Benton Casing Serv., Inc.*, 619 F. Supp. 831 (S.D. Miss. 1985), where the court cited an affidavit by LOCA's Executive Director and a Plan trustee that the LOCA Plan had been "established under the Employee Retirement Income Security Act . . . ." 619 F. Supp. at 837. The state court pleadings, so amended, were later adopted by the federal district court.

["LHWCA"], specifically § 21(d), 33 U.S.C. § 921(d) (1982), "does not confer rights—let alone a specific and uniquely federal right enforceable in a federal court of equity . . . ." 862 F.2d at 504; App. at 85a. The Fifth Circuit therefore held that the LHWCA did not come within the "as expressly authorized" exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1982). *Id.*; App. at 86a.

Without any examination of ERISA or discussion of the exceptional differences between ERISA and the LHWCA, the Fifth Circuit mechanically applied its holding in *Jackson* to the case at bar and held that the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), precluded the district court "from enjoining a pending state court action even where, as here, 'federal preemption or interference with a federally protected right . . . is unmistakably clear.'" App. at 2a.

Further relying on *Jackson*, the Fifth Circuit also held that the declaratory relief afforded by the district court in the case at bar was "inapposite in that it interfered with a pending action in state court, albeit a court without jurisdiction." App. 3a.

The Fifth Circuit concluded its decision herein by vacating the district court's judgment and remanding the case for further proceedings "despite the district court's sensible pre-*Jackson* disposition of this matter." *Id.*

REASONS FOR GRANTING THE WRIT

I. Review Of The Fifth Circuit's Decision Is Necessary To Effectuate Congress' Intent For ERISA To Be An Act Within the "Expressly Authorized" Exception To The Anti-Injunction Act

The Fifth Circuit's decision in the case at bar was based entirely upon its en banc decision in *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3704 (U.S. Apr. 24, 1989) (No. 88-1295). In *Jackson* the Fifth Circuit reviewed "the authority of a federal district court to enjoin the prosecution of a previously filed state court suit and declare the purported state law causes of action therein asserted preempted by the *Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950.*" 862 F.2d at 493; App. at 60a (emphasis added). Almost the same question is presented in this Petition, but with respect to ERISA, not the LHWCA: Does a federal district court have the authority to enjoin the prosecution of a previously filed state court suit and declare the purported state law causes of action therein asserted preempted by ERISA?

A. The Fifth Circuit's Decision Unreasonably Narrows The "As Expressly Authorized" Exception To The Anti-Injunction Act

The Anti-Injunction Act, 28 U.S.C. § 2283 (1982), provides that a federal district court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress . . . ."

The general principles which obtain in construing the Anti-Injunction Act have been enunciated in several cases decided

by this Court. For example, any injunction of state court proceedings must be based on one of the specific exceptions provided in the Anti-Injunction Act itself. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). The exceptions to the Anti- Injunction Act are narrow and should not be enlarged by loose statutory construction. *Id. See also Chick Kam Choo v. Exxon Corp.*, 108 S. Ct. 1684 (1988). A clear preemption of state law contained in a federal statute does not authorize enjoining state court proceedings since preemption alone does not fall within one of the Anti-Injunction Act's exceptions. *Id.* Even a preemption provision of a federal statute which deprives the state court of jurisdiction does not come within the Anti-Injunction Act's exceptions. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

To come within the "as expressly authorized" exception to the Anti-Injunction Act's proscription, this Court in *Mitchum v. Foster*, 407 U.S. 225 (1972), stated three relevant criteria: A federal law "need not contain an express reference" to the Anti-Injunction Act; or "expressly authorize an injunction of a state court proceeding"; but "must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." 407 U.S. at 238. The test is "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.*

ERISA's provisions for appropriate equitable relief under ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3) (1982), *supra* p. 3, provide exclusive federal rights to obtain exclusive federal remedies under the Act. These rights and remedies available under ERISA have been addressed in numerous cases. *See, e.g., Massachusetts Mut. Life Ins. Co.*

v. Russell, 473 U.S. 134 (1985); *Dime Coal Co. v. Combs*, 796 F.2d 394 (11th Cir. 1986); *Powell v. Chesapeake and Potomac Telephone Co. of Va.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, (1986); *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). In fact, ERISA's "virtually unique preemption provision," ERISA § 514, 29 U.S.C. § 1144 (1982), requires the federal courts to develop a "'body of Federal substantive law.'" *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983).

Included among the rights provided by ERISA are those accorded to participants and beneficiaries to receive a summary plan description of their plan written in language "calculated to be understood by the average plan participant," ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1982); to receive an annual report detailing financial and actuarial data for their plan, which data must be certified by a certified public accountant and enrolled actuary, ERISA § 103, 29 U.S.C. § 1023 (1982); to have assets of the plan held in trust, ERISA § 403, 29 U.S.C. § 1103 (1982); to require plan fiduciaries to act solely in the interest of plan participants for the exclusive benefit of providing benefits to participants and their beneficiaries, ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1982); to seek redress of interference with protected rights, ERISA § 510, 29 U.S.C. § 1140 (1982); and a host of other rights. Fiduciaries, too, have the right to expect and require co-fiduciaries to adhere to the strict guidelines ERISA provides for the discharge of fiduciary duties or face possible liability themselves for failing to require compliance by their colleagues, ERISA § 405, 29 U.S.C. § 1105 (1982); to seek an exemption from the numerous kinds of transactions ERISA prohibits when the interests of participants would be better served, ERISA §§ 406, 408, 29 U.S.C. §§ 1106, 1108 (1982); and other rights.

The unique federal remedies available to participants,

beneficiaries, fiduciaries and the Secretary of Labor are carefully set out in ERISA § 502(a), 29 U.S.C. § 1132(a) (1982). Participants and beneficiaries may seek plan benefits, enforce plan rights, and have a court determine rights to future benefits. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1982). The Secretary, or a participant, beneficiary or fiduciary may seek appropriate relief for a fiduciary's violation of the duty he owes to a plan. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1982). A participant, beneficiary or fiduciary is given the specific right and remedy of obtaining an injunction to prevent any violation of ERISA and to redress such violations. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1982). Of course, additional remedies are available to the Secretary of Labor. *See* ERISA § 502(a)(4)-(6), 29 U.S.C. § 1132(a)(4)-(6) (1982).

The unique federal rights and remedies available under ERISA can be obtained by application to a federal court of equity. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982). The only remedy available within the concurrent jurisdiction of state courts is that by a participant or beneficiary for plan benefits. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 1982). All other remedies under ERISA can only be obtained from a federal district court. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982). Thus, the remedy in this case, either for Respondents' claims in their state court proceeding or Petitioners' claims in this federal proceeding, could only obtained from a federal district court.

That the rights and remedies are uniquely and exclusively federal is manifest in ERISA's preemption of all state laws with only a few very narrow exceptions. ERISA § 514, 29 U.S.C. § 1144 (1982). In fact, Congress refused to enact a proposed preemption section which preempted only specific subjects. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Many courts have discussed the equitable nature of suits brought under ERISA § 502(a), 29 U.S.C. § 1132(a) (1982). *See e.g., Massachusetts Mut. Life Ins. Co. v. Russell, supra.* Indeed, numerous courts have decided that since ERISA claims are equitable, not legal in nature, no trial by jury is constitutionally required for such claims. *See, e.g., Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988); *Crews v. Central States, Southeast and Southwest Pension Fund*, 788 F.2d 332 (6th Cir. 1986); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir.), *cert. denied sub nom. Cody v. Donovan*, 469 U.S. 1072 (1984); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

The last aspect of the *Mitchum* test is that the intended scope of ERISA can only be given effect by stay of state court proceedings. LOCA's state court action against ISC for alleged breach of fiduciary duty could only be tried by a federal court. LOCA sought to recover damages for itself, an obvious violation of its duty to act solely in the interest of the participants. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1982). As the Plan's sponsor, LOCA was statutorily barred from receiving any gain from the Plan's operation as a voluntary employees' beneficiary association. ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1) (1982). *See also* 26 U.S.C. § 501(c)(9) (1982); 26 C.F.R. § 1.501(c)(9)-1(d) (1980).

Only the district court's stay of state court proceedings in this case could give effect to the intended scope of ERISA, since "[i]t is central to the statutory scheme that ERISA not be subject to state and local laws which might frustrate its goals." *General Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980).

In this case the Fifth Circuit vacated the district court's order staying previously filed state court proceedings. The Fifth Circuit held that "the Anti-Injunction Act, specifically 28 U.S.C.

§ 2283, bars a federal court from enjoining a pending state court action even where, as here, 'federal preemption or interference with a federally protected right . . . is unmistakably clear.''' App. at 2a. The Fifth Circuit made no attempt to analyze any aspect of ERISA, but merely applied to this case the rationale of its decision in *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3704 (U.S. Apr. 24, 1989) (No. 88-1295).

The *Jackson* decision only concerned whether the Longshoremen's and Harbor Workers' Compensation Act [''LHWCA''], 33 U.S.C. §§ 901-950 (1982), came within one of the exceptions to the Anti-Injunction Act. In its analysis of the LHWCA in *Jackson*, the Fifth Circuit found that § 921(d)[2] conferred no uniquely federal right enforceable in a federal court of equity, which engendered the conclusion that the LHWCA did not come within the ''as expressly authorized by Act of Congress'' exception to the Anti-Injunction Act.[3] 862 F.2d at 503-04; App. at 83a-86a.

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[2]Section 921(d) provides:

> ''If an employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred . . . . If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.''

[3]In *Jackson* the Fifth Circuit also held that the LHWCA did not fall within the ''except . . . to protect or effectuate its judgments'' exception contained in the Anti-Injunction Act, also known as the ''relitigation'' exception. 862 F.2d at 503; App. at 83a. The third exception, ''where necessary in aid of its jurisdiction,'' was not relied on by either the Petitioner or

Remarkably, in applying its *Jackson* decision to this case, the Fifth Circuit did not even consider whether ERISA § 502(a)(2) or (3), 29 U.S.C. § 1132(a)(2) or (3) (1982), confers specific and unique federal rights. Nor did it consider whether such rights are enforceable in a federal court of equity under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). There was no comparison of section 1132 in ERISA with section 921(d) in the LHWCA. The Fifth Circuit merely applied its earlier LHWCA decision in Jackson to the "able and comprehensive orders and opinions" of the district court and vacated that court's "well-reasoned judgment." App. at 2a. The application of a decision based on the LHWCA to a case arising under ERISA, when the two statutes have no commonality, impermissibly narrows, if not eliminates, the "expressly authorized" exception to the Anti-Injunction Act.

B. The Fifth Circuit's Decision Thwarts Congress' Intent To Provide Ready Access To The Federal Courts For ERISA Litigants

In enacting ERISA Congress sought to establish "minimum standards" to assure "the equitable character of [employee benefit] plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a) (1982). Congress effected its goal by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, *and ready access to the Federal Courts.*" ERISA § 2(b), 29 U.S.C. § 1001(b) (1982) (emphasis added). One of the principal aims of Congress in drafting ERISA was to eliminate conflicting systems of state and local regulation which governed private employee benefits. H.R. Rep. No. 533, 93d Cong. 1st Sess. 12 (1973), *reprinted*

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by the lower court in *Jackson*. 862 F.2d at 496 n.6; App. at 67a n.6. Neither of these two exceptions to the Anti-Injunction Act appear to be germane to the district court's stay of state court proceedings in the case at bar.

in Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 2 Legislative History of the Employee Retirement Income Security Act of 1974, at 2359 (1976); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams); *id.* at 29197 (remarks of Rep. Dent). Congress intended ERISA to establish a single regulatory scheme for evaluating fiduciary conduct, *id.*, which it accomplished through "six carefully-integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Congress further provided for a very broad preemption of state law causes of action. ERISA § 514, 29 U.S.C. § 1144 (1982). *See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).[4]

In short, ERISA was designed to make employee benefit plan regulation "as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). To underscore the importance of federal control in the employee benefits area, Congress not only established a detailed set of standards and duties to guide fiduciaries, *see* ERISA § 404, 29 U.S.C. § 1104 (1982), but also vested the federal courts with exclusive jurisdiction over suits alleging a breach of fiduciary responsibility. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982).

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[4]The predicate for inclusion of ERISA within the "expressly authorized" exception to the Anti-Injunction Act is Congress' intent to so include ERISA, as can be seen in its broad and unique preemption of almost all state laws. That intent is further seen in Congress' provision for exclusive federal jurisdiction over claims, as in the one at bar, brought under ERISA § 502(a)(2) or (3), 29 U.S.C. § 1132(a)(2) or (3). Thus, ERISA's provisions for preemption and exclusive jurisdiction do not themselves trigger inclusion within the exception to the Anti-Injunction Act, but ineluctably evidence Congress' intent for inclusion.

The commencement of Respondents' state court action in February 1984, and their filing an amended complaint in February 1986, antedated this Court's decisions in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). The removability of Respondents' action was not obvious until after the *Dedeaux* and *Taylor* decisions were rendered. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 67 n. Implicit, however, in the *Dedeaux* and *Taylor* decisions is Congress' intent to make the field of employee benefits an exclusive area of federal concern.

Yet the Fifth Circuit's decision in this case ignores congressional intent for ERISA, and allows an ERISA action filed in state court to run its course. Its decision would render illusory Congress' intent to "provide ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b) (1982). Waiting the months or years necessary to resolve an ERISA action erroneously, or perhaps even tactically, brought in state court would substantially delay resolution of claims by ERISA participants, beneficiaries and fiduciaries for breach of fiduciary duty or for appropriate equitable relief before such claims could be heard in the only court having jurisdiction—a federal district court. This aspect of the Fifth Circuit's decision could prove catastrophic to plan administration.

It is clear that Congress intended participants and beneficiaries to have ready access to the federal courts to seek redress for breach of fiduciary duty. *See, e.g., Corley v. Hecht Co.*, 530 F. Supp. 1155 (D.D.C. 1982); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir.), *cert. denied sub nom. Cody v. Donovan*, 469 U.S. 1072 (1984).

Congress also intended ERISA plan fiduciaries, such as ISC and LOCA, to have immediate access to the federal courts. Often, ERISA fiduciaries, who are charged with discretionary authority with respect to an employee benefit plan, ERISA

§ 3(21)(A), 29 U.S.C. § 1002(21)(A) (1982), need a federal court's direction before they can proceed to provide for a plan's operations or redress a breach of fiduciary duty by another fiduciary. *See, e.g., Schoenholtz v. Doniger,* 628 F. Supp. 1420 (S.D.N.Y. 1986); *Eaton v. D'Amato,* 581 F. Supp. 743 (D.D.C. 1980); *McNeil v. Suffolk County Painters Ins., Welfare, Vacation, & Supplemental Funds,* 431 F. Supp. 387 (E.D.N.Y. 1977).

ERISA provides a detailed set of rigorous standards to guide fiduciaries in the performance of their duties in administering employee benefit plans. ERISA § 404, 29 U.S.C. § 1104 (1982). Fiduciaries who breach the responsibilities they owe to plans are subject to personal liability for the damage their breach causes a plan, and are subject to removal. ERISA § 409, 29 U.S.C. § 1109 (1982). While ERISA's provisions for fiduciary duties and penalties for breaching the same are strict, and sometimes severe, the principle of exclusive federal jurisdiction offers a counterbalance. The fiduciary who must undergo scrutiny of his activities for an ERISA-governed plan should not have to endure proceedings in any tribunal without jurisdiction. To thus subject the fiduciary could paralyze plan administration by attenuating the legal proceedings necessary to vindicate the fiduciary or resolve his alleged impropriety. In the meantime, the plan often will suffer from uncertainty from questions as to what may be proper or improper fiduciary conduct. The only way to prevent a hiatus of this nature is to provide ready access to the federal courts as Congress intended. ERISA § 2(b), 29 U.S.C. § 1001(b) (1982). Thus, application to a federal district court, as Congress provided in ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982), should produce a stay of proceedings in state court to facilitate fiduciary problem resolution. In this way, expense to the plan for attorney's fees incurred to defend a plan fiduciary who is exonerated of wrongdoing would be substantially reduced.

Thus, ERISA provides unique federal rights and remedies enforceable in a federal court of equity. Its intended scope could only have been given effect by the stay of state court proceedings granted by the district court.

Unless reversed, the Fifth Circuit's *Jackson* decision, as applied to this case and construing only the Longshoremen's and Harbor Workers' Compensation Act, would speak for ERISA. The underlying purpose of making ERISA an exclusive federal concern would thus be frustrated, or even subverted. Worse, Congress' intent for providing ready access to the federal courts for ERISA participants, beneficiaries and fiduciaries would be thwarted. In the final analysis, those who would suffer most from the Fifth Circuit's decision in this case would be those for whom ERISA was designed to protect—the participants in employee benefit plans. ERISA § 2(b), 29 U.S.C. § 1001(b) (1982).

II. The Fifth Circuit's Decision Conflicts With Decisions Of Other Federal Courts of Appeals As To An Important Question of Law, Which Has Not Been, But Should Be, Settled By This Court

Decisions rendered in other U.S. Courts of Appeals hold that ERISA comes within the "as expressly authorized" exception to the Anti-Injunction Act. To the contrary is the Fifth Circuit's decision herein. This Honorable Court has not considered the question whether ERISA comes within one of the exceptions to the Anti-Injunction Act.

In *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2d Cir. 1977), the district court had dismissed the Secretary of Labor's complaint for declaratory relief and to stay previously filed state court proceedings. In holding that the Anti-Injunction Act did not bar enjoining the state court proceedings, the Second Circuit wrote:

> The superior federal interest sought to be vindicated here is clear from §§ 502 and 514 of the Act as well as its legislative history which establish the congressional intent that the United States regulate the field of employee benefit plans eliminating the threat of conflicting and inconsistent local regulation.

588 F.2d at 683. The Secretary of Labor's complaint in *Chase Manhattan* stated that any judgment rendered by the state court with respect to an ERISA claim over which it lacked jurisdiction would result in " 'irreparable injury to the public interest in the uniform administration of Title I of ERISA.' " *Id.* at 681. Petitioners agree with the Secretary's allegation, and urge the Court to consider the irreparable injury to the public interest should courts without jurisdiction, but trying ERISA breach of fiduciary duty or appropriate relief cases, not be amenable to stays by federal courts having jurisdiction.

In *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), the Sixth Circuit considered application of the Anti-Injunction Act to ERISA. Relying on the two-prong test provided in *Mitchum v. Foster*, 407 U.S. 225 (1972), the court held that "ERISA meets both prongs of the Mitchum test," 623 F.2d at 459, in that, ERISA confers a uniquely federal right or remedy, and ERISA is an act which could be given its intended scope only by the stay of a state court proceeding. The court thus concluded that the Anti-Injunction Act does not prohibit an ERISA fiduciary from obtaining an injunction against state garnishment proceedings.

The Second Circuit has also held that enjoining state administrative proceedings, which sought to compel an employer to pay severance benefits, did not violate the Anti-Injunction Act, the court assuming that the Act applied to proceedings before the New York Department of Labor Industrial Board of Appeals. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320

(2d Cir. 1985), *aff'd sub nom. Roberts v. Burlington Indus., Inc.*, 477 U.S. 901 (1986).

District courts have also considered the Anti-Injunction Act. In *Senco of Fla., Inc. v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979), the court considered the applicability of the Anti-Injunction Act to ERISA, and concluded that "Congress must have intended ERISA to come within the 'expressly authorized' exception to the Anti-Injunction Act." 473 F. Supp. at 905. *See also Cartledge v. Miller*, 457 F. Supp. 1146 (S.D.N.Y. 1978).

The foregoing decisions represent the majority view that ERISA comes within the "expressly authorized" exception to the Anti-Injunction Act. Conflicting with that view is the decision by the Fifth Circuit in this case. Only this Court can settle the conflict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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June 23, 1989

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4450

INCOME SECURITY CORPORATION, INC.
and GARY FELTON,
Plaintiffs-Appellees,

VERSUS

LOUISIANA OILFIELD CONTRACTORS
ASSOCIATION, INC., ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Louisiana
(CV86-1664-0)

(March 22, 1989)

Before GEE, SMITH, and DUHE, Circuit Judges.

PER CURIAM:*

On appeal, the Louisiana Oilfield Contractors Association, Inc., et al. ("LOCA"), attack the judgment of the district court

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

that, *inter alia*, granted plaintiffs' motion for summary judgment on the ground that LOCA's claims were time-barred and stayed the pending state court proceedings and directed that they be transferred to the district court. We vacate and remand.

In its able and comprehensive orders and opinions, the district court correctly held that subject-matter jurisdiction was vested in that court to the exclusion of any state court and that by the time the appellees brought the instant action, the opportunity for LOCA to assert its claims in a court having jurisdiction over the same was precluded by the fact that such claims were time-barred. Because of the juxtaposition here of co-existing state and federal actions, however, we are unable to affirm.

In its judgment, the district court stayed further proceedings in the state court and directed that all pleadings and documents in the state proceeding be transferred to the federal district clerk. However, in light of an en banc opinion issued by this court subsequent to the well-reasoned judgment which we now review, the injunction cannot stand. In *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 504 (5th Cir. 1988) (en banc), *petition for cert. filed*, 57 U.S.L.W. 3522 (U.S. Feb. 3, 1989) (No. 88-1295), we held that the Anti-Injunction Act, specifically 28 U.S.C. § 2283, bars a federal district court from enjoining a pending state court action even where, as here, "federal preemption or interference with a federally protected right . . . is unmistakably clear." Instructed by *Jackson*, we hold that the injunctive relief issued by the district court must be vacated.

Read as a whole, the opinions and judgment of the district court additionally have the effect of issuing declaratory relief regarding the claims asserted. But in *Jackson*, we also cautioned against the use of declaratory relief in circumvention

of the proscription against injunctions: "A federal declaratory judgment will, of course, be *res judicata* of the state suit, thus resolving it as surely as an injunction . . . ." *Id.* at 505. Thus, *Jackson* informs us that declaratory relief here was inapposite in that it interfered with the pending action in state court, albeit a court without jurisdiction.

Thus, despite the district court's sensible pre-*Jackson* disposition of this matter, we VACATE the judgment below and REMAND for further proceedings consistent herewith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

INCOME SECURITY CORPORATION, INC., and GARY FELTON Plaintiffs	)	Civil Action No. CV86-1664 Section 0
v.	)	
LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC. EMPLOYEE BENEFIT TRUST, RANDY K. HAYNIE, GEORGE CRAIN, JR., WAYNE BOLLICH, PETER BORNE, ED PREIS, RODNEY GUIDRY, MALCOLM GORDON, NED CLARK, DWIGHT W. ANDRUS INSURANCE INC., DANIEL FRUGÉ, VANCE ANDRUS, U.S. BENEFITS, INC., and HARBOR INSURANCE COMPANY, INC., Defendants	)	

ORDER

This is an action for contractual damages, declaratory judgment, and injunctive relief. The issue now before the Court is whether the case ought to be dismissed because of lack of subject matter jurisdiction in the federal court.

FACTS

This case arises out of the decision by defendant Louisiana Oilfield Contractors Association, Inc. ["LOCA"] to create a

medical and life benefit plan ["LOCA Plan" or "Plan"] for its members and two lawsuits filed in state court in the aftermath of economic problems with the Plan.

LOCA is a non-profit corporation organized prior to 1981 to provide information and expertise in areas of interest common to its members, which are companies involved in oilfield services. Membership in LOCA is voluntary, but requires the payment of dues.

According to the state court pleadings of defendants LOCA, the Plan, and Dwight W. Andrus Insurance, Inc. ["Andrus Insurance"], and the statements of counsel, LOCA contacted Andrus Insurance, a general insurance agency, for assistance in formulating the Plan. Andrus Insurance in turn sought the assistance of Income Security Corporation ["ISC"], which was and is a contract provider of administrative claims services for single and multi-employer benefit plans. Plaintiff Gary Felton ["Felton"] is president of ISC.

The Plan was offered to LOCA's member-employers on a voluntary participation basis. In general, the Plan involved the contribution by member-employers to a common fund in the form of a trust, from which the trustees paid claims submitted by participants in the Plan, expenses incurred by the Plan for stop-loss insurance premiums, and fees for providers of service to the Plan.

The trust, called the Louisiana Oilfield Contractors Association, Inc. Employee Benefit Trust ["LOCA EBT"], also a defendant herein, was created by LOCA to manage and administer the funds contributed to the Plan by member-employer companies.

Among other provisions, the Trust Agreement signed by the initial LOCA EBT Trustees provided the following:

2.1 The Employer [LOCA] has established with the Trustees a general Trust Fund . . . .

2.2 The exclusive purpose of this trust is to provide benefits permitted to be provided by section 501(c)(9) of the Internal Revenue Code . . . for the benefit of Employees and the Dependents of such Employees . . . .

. . .

2.6 The Trustees shall meet . . . for the purpose of establishing and reviewing a funding policy and method for the Fund which is consistent with the applicable provisions of the Employee Retirement Income Security Act of 1974 . . . .

. . .

3.1 This Trust shall be administered by the Trustees . . . . No person shall be confirmed or permitted to serve as . . . Trustee . . . in violation of section 411 of the Employee Retirement Income Security Act of 1974 . . . .

. . .

3.6 . . . The Trustees shall also make available or furnish . . . any reports and information with respect to the Fund, as required by Part I, Title I of the Employee Retirement Income Security Act of 1974.

. . .

3. 8 [N]o Trustee shall incur any personal liability for any act or failure to act on the part of any other Trustee except as such liability may be imposed under the provisions of the Employee Retirement Income Security Act of 1974.

. . .

3.10(b) [N]othing . . . in this Trust Agreement shall relieve a Trustee or Trust Employee of any

> responsibility or liability for any responsibility, obligation or duty under the Employee Retirement Income Security Act of 1974 . . .
>
> . . .
>
> 3.18 For purposes of complying with Part 4 of Title I of the Employee Retirement Income Security Act of 1974, . . . the provisions of the Trust Agreement, insurance contracts and other plans of benefits adopted by the Trustees for the Trust shall be the written instruments pursuant to which the plan is maintained and shall constitute the employee benefit plan.

LOCA and ISC entered into a Service Agreement which denominated ISC as the "Plan Supervisor," reciting in part, "The purpose of this Service Agreement is to memorialize as between the parties the contract under which the Plan Supervisor shall perform certain administrative functions as described in the Department of Labor Regulations at 29 CFR Sections 2509.75-8, No. D-2." The reference to Department of Labor Regulations is a reference to regulations issued by that Department under authority contained in ERISA § 505, 29 U.S.C. § 1135.

LOCA, defined by the Service Agreement, paragraph II(a), as the "Plan Sponsor/Plan Administrator" ["P S/A"] had the following duties: "The Plan Administrator (as defined in the Employment Requirement [sic] Income Security Act of 1974) has the absolute authority for the plans, contractual arrangements, benefit limits, administrative guidelines, and all other things contemplated under this agreement."

Also in paragraph II(a) of the Service Agrement, LOCA contracted that "[t]he Plan Supervisor will act according to the P S/A's recommendations . . . ."

The Service Agreement in paragraph III(e) provided that:

> [T]he Plan Supervisor does not insure nor underwrite the liability of the P S/A under this Employee Benefit Plan, except that the Plan Supervisor shall be responsible for providing adequate re-insurance coverage with a good and solvent company to the extent and in such amount of re-insurance as the Plan Supervisor is directed by the P S/A . . . .

Additionally, ISC, as the Plan Supervisor, was responsible for making the initial "estimated claims cost," defined in paragraph Ic of the Service Agreement to be "the initial estimate by the Plan Supervisor of the annual health claims liability for the first year of the P S/A's operation of the partially self-funded health benefits plan."

The Plan was established with the execution of a Summary Plan Description ["SPD"], which was submitted to the U.S. Department of Labor for approval. *See* Exhibits 1 and 2 to the Motion and Affidavit of counsel for defendant Harbor. The SPD provides a "Statement of ERISA Rights." *Id.*, Exhibit 1, at D7-D8. The LOCA Plan was submitted to and approved by the Internal Revenue Service as a tax-exempt voluntary employee benefit association under 26 U.S.C. § 501(c)(9). *Id.*, Exhibit 3. Defendant Frugé, the Plan's accountant, filed Forms 5500 and 990 with the IRS, which forms are required filings for employee benefit plans governed by ERISA. *Id.*, Exhibits 4 and 5. The Plan gave Notice of Modification pursuant to the provisions of ERISA. *Id.*, Exhibit 6. The Plan's attorneys advised its trustees on their fiduciary obligations imposed by ERISA. *Id.*, Exhibits 7, 8, 9. The minutes of the Plan's trustee meetings show an attempt to comply with the requirements of ERISA. *Id.*, Exhibit 10. Randy K. Haynie, Executive Director of LOCA and one of the Plan's trustees, and Vance Andrus and Don Capretz, attorneys to the Plan, testified in their depositions that they each knew the Plan was governed by ERISA and sought to comply with its provisions. *See* Affidavit of plaintiffs' counsel.

During the time period in issue in this case, the Plan paid to healthcare providers for the account of participants and beneficiaries, several million dollars in benefits.

After LOCA, the Plan and Andrus Insurance had commenced two civil actions in state court involving substantially the same facts and issues as are involved in the case now before the Court, defendant Randy K. Haynie, Executive Vice President of LOCA and a Trustee throughout the life of the Plan, signed an affidavit which was used in an unrelated case, *Hutchinson v. Benton Casing Serv., Inc.*, 619 F. Supp. 831, 837 (S.D. Miss. 1985), describing the same employee welfare benefit plan which is here at issue:

> "The Louisiana Oilfield Contractors Association, Inc. Employee Benefit Trust was established under the Employee Retirement Income Security Act, 29 U.S.C. Section 1001, et seq. (E.R.I.S.A.). This trust is a fully self-insured, self-funded program wherein all claims paid are paid from trust funds resulting from premium dollars received by the trust. . . ."

The Form 5500, a document required to be submitted to the Internal Revenue Service by the Plan, lists both Andrus Insurance and ISC as "fiduciaries" for the years 1981 and 1982. *See* Exhibits 4 and 5 to the Motion and Affidavit of counsel for defendant Harbor.

LOCA EBT purchased from defendant Harbor Insurance Company ["Harbor"] a "Reinsurance Agreement." Pursuant to this agreement, and under the conditions and terms stated therein, Harbor would reimburse the Plan to the extent that the Plan paid covered medical expenses which exceeded the amount of the "specific attachment point" for each employee or the "annual aggregate attachment point" for the Plan as a whole. Under the stop-loss insurance agreement, the Plan

was not reimbursed for expenses in excess of the "aggregate attachment point" unless such expenses had actually been paid by the Plan within a specified period of time.

Defendant US Benefits, Inc. ["USB"] was the underwriting manager and intermediary for Harbor in connection with the issuance of this Agreement.

The funding level of the Plan, that is, the amount to be charged each employer and its employees, was determined by adding administrative costs, anticipated claims, and premiums to be paid by the Plan for stop-loss insurance.

According to the allegations in the pleadings, LOCA, together with Andrus Insurance and ISC, introduced the Plan to LOCA's member companies in August 1981. The Plan commenced operation on October 1, 1981. During the middle of the second plan year, January to June 1983, the Plan experienced cash flow problems which caused substantial delay in the payment of claims. All parties seem to agree that the cash flow difficulties resulted from "underfunding," that is, the failure to charge and receive a sufficient amount of money (funding level) from each employer and its employees to cover anticipated claims during the plan year. Underfunding would result in the inability of the Plan to pay anticipated claims, as well as its inability to attain the "aggregate attachment point," or that level of paid claims which would cause the stop-loss insurance carrier to begin reimbursing the Plan for all claims paid in excess of the aggregate attachment amount.

LOCA, the Plan, the Plan's trustees, and the advisors retained by them, a certified public accountant and an attorney, contend that it was the contractual duty of ISC and Felton to establish adequate funding levels for the plan. ISC and Felton contend to the contrary, citing the Service and Trust Agreements and the Summary Plan Description, the plan documents under which the employee welfare plan was operated.

Principally as a consequence of the "underfunding" problems, two civil actions were commenced in state court in early 1984. One of the civil actions was brought by LOCA, the Plan, LOCA EBT and the LOCA EBT Trustees. The other was filed by Andrus Insurance. Both actions were commenced in the 15th Judicial District Court, Lafayette Parish, Louisiana, docket numbers 84,1140C and 84-1162C, and were consolidated by the state court. While other party defendants were named, these state court actions were principally directed against ISC, Felton, USB and Harbor.

The allegations of each of the petitions filed in state court set out claims against defendants generally described by the petitioners as negligence, errors and omissions, tortious conduct, breach of contract, breach of quasi-contract, breach and violation of fiduciary duty, and breach of the covenant of good faith and fair dealing. In the briefs and oral arguments of LOCA, LOCA EBT and Andrus Insurance, their counsel have also characterized their claims as claims of "malpractice."

For more than two years significant discovery took place in Louisiana, California, North Carolina and Florida, principally through depositions, interrogatories and production of thousands of documents. It appears that the only discovery remaining to be completed in the state court actions is the taking of the depositions of the numerous expert witnesses severally retained by many of the parties.

Petitioners amended their pleadings several times during the course of discovery in state court. In early 1986, LOCA, LOCA EBT and the Trustees filed "restated" petitions. Among the allegations made in the restated petitions were the following:

7.

Defendants, INCOME SECURITY CORPORATION and GARY FELTON, were selected by LOCA to formulate a health care benefits and major medical partially self-funded plan with Cap Insurance Protection. Said defendants did in fact formulate the plan and serve as the self-professed experts in charge of the formulation, development and administration of such plan which resulted in the formation of the LOCA TRUST by LOCA. At all times relevant hereto, plaintiffs relied upon the alleged expertise of [said] defendants . . . .

8.

At all times relevant hereto, GARY FELTON and/or INCOME SECURITY CORPORATION were an "Approved Third Party Administrator" and duly authorized representatives, agents and salesmen for U.S. BENEFITS, INC., which in turn was the exclusive general managing agent for HARBOR INSURANCE COMPANY . . . . As such, GARY FELTON and INCOME SECURITY CORPORATION were the agents for U.S. BENEFITS, INC. and through U.S. BENEFITS, INC. they were also the agents for HARBOR INSURANCE COMPANY and as such, HARBOR INSURANCE COMPANY, U.S. BENEFITS, INC. and their insurers are liable in solido . . . on the basis of respondeat superior and further under (ERISA) and as co-fiduciaries and/or principals of fiduciaries.

9.

Plaintiffs, knowing little of the intracacies [sic] about the partially self-funded health insurance business, relied on defendants . . . to prepare, formulate,

devise and otherwise implement the health and major medical program of LOCA and LOCA Trust. Plaintiffs further relied upon the representations of defendants, GARY FELTON and INCOME SECURITY CORPORATION as to the rate structure (and its adequacy) for plan participants, and their assurances that the plan was fully self-funded and that the premiums and rates set by GARY FELTON/ISC/USB were adequate for all purposes intended . . . . . .

11.

Defendants, GARY FELTON and INCOME SECURITY CORPORATION, as the Third Party Administrator for the LOCA Trust and LOCA health plan and as a fiduciary as defined under ERISA, individually and as agent for U.S. BENEFITS, INC. and HARBOR INSURANCE COMPANY, as well as said defendants, U.S. BENEFITS, INC. and HARBOR INSURANCE COMPANY (as principals of the agent GARY FELTON and INCOME SECURITY CORPORATION, as well as fiduciaries themselves) were charged with the ultimate responsibility for and authority over the formulation and implementation of a health and life plan for the Association and the determination of adequacy of its rate structure . . . .

13.

[D]efendants were aware or should have been aware and/or did actually advise plaintiffs of the actual gross plan participant monthly rate that was either being charged or to be charged; said gross rates (and its component aggregate factors) proved not to be adequate and in fact caused a major underfunding . . . . . .

15.

During the second year of the aforedescribed plan, GARY FELTON and INCOME SECURITY CORPORATION specifically recommended increases in plan participant gross rates . . . as agent for the other defendants; . . . said rate increases . . . were grossly inadequate . . . all as a result of the errors, omissions, negligence, or other tortious conduct on the part of the defendants directly, individually, or imputed to them through the principal agency relationship or under the laws of ERISA or other Federal laws.

. . .

25.

Defendants through GARY FELTON and INCOME SECURITY CORPORATION continually . . . assured plaintiffs . . . that re-insurance and insurance was in full force and effect along with weekly indemnity benefit coverage insurance.

26.

[I]n the event the Court determines that weekly indemnity benefits coverage insurance/re-insurance does not exist under any of the policies issued by HARBOR INSURANCE COMPANY . . . then GARY FELTON and INCOME SECURITY CORPORATION and other defendants were negligent and guilty of errors and omissions or legal fault in failing to obtain the coverage desired . . . . Defendants are liable jointly, severally and in solido . . . on the basis of breach of contract, breach of quasi contract, negligence, errors, omissions as well as tortious conduct under the laws of the State of Louisiana or proscribed conduct and/or tortious conduct

> under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Sections 1101, et seq. . . .

Andrus Insurance likewise filed an amended petition, which was substantially similar to LOCA's, except that it did not specifically mention ERISA.

On July 29, 1986, plaintiffs ISC and Felton commenced this action, seeking to have this Court declare the rights, duties and obligations of the parties in the state court actions, and further seeking to stay all further state court proceedings on the ground that the state court lacks jurisdiction over the subject matter of the restated petitions, and on the ground that the causes of action asserted against ISC and Felton therein are preempted by the provisions of the Employee Retirement Income Security Act of 1974 ["ERISA"], as amended, 29 U.S.C. §§ 1001, et seq.

After this action in federal court was filed, counsel for LOCA, LOCA EBT and the LOCA Trustees in the state court action amended their petition again to delete all references to ERISA. The petition was not otherwise amended.

Defendants LOCA, the Plan, Andrus Insurance, the Plan's trustees, attorney and certified public accountant severally answered, generally denying the allegations of the complaint and contending that this Court lacks jurisdiction over the subject matter.

This action is now before the Court on a Motion to Stay State Court Proceedings filed herein by ISC and Felton and the Motions to Strike Complaint and for Summary Judgment filed by LOCA, the Plan, and Andrus Insurance, all of which motions focus attention on the jurisdictional provisions of ERISA.

APPLICATION OF ERISA TO THE LOCA PLAN

Section 4 of ERISA, 29 U.S.C. § 1003, provides in part:

> **Coverage**
>
> (a) Except as provided in subsection (b) and in sections 201, 301, and 401 [29 U.S.C. §§ 1051, 1081, and 1101], this title shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by *any* employer engaged in commerce or in any industry or activity affecting commerce;
>
> (2) by *any* employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

(Emphasis added) The first inquiry, therefore, is whether the LOCA Plan was an "employee benefit plan."

An "employee benefit plan" is defined to include a plan which is an "employee welfare benefit plan," which is defined as:

> [A]ny plan, fund, or program which was . . . established or maintained by an employer or an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .

ERISA § 3(1), 29 U.S.C. § 1002(1).

From § 1002(1) it appears that an employee welfare benefit plan must be (1), a plan, fund or program, (2) that is established

or maintained, (3) by an employer or an employee organization, or both, (4) for the purpose of providing medical, surgical, hospital care, or other benefits, and (5) to participants who are the beneficiaries. In *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), the court stated that the last three prerequisites above were either self-explanatory or defined by statute, and went on to write:

> Not so well defined are the first two prerequisites: "plan, fund, or program" and "established or maintained." Commentators and courts define "plan, fund, or program" by synonym — arrangement, scheme, unitary scheme, program of action, method of putting into effect an intention or proposal, design — but do not specify the prerequisites of "plan, fund, or program." At a minimum, however, a "plan, fund, or program" under ERISA implies the existence of intended benefits, intended beneficiaries, a source of financing, and procedure to apply for and collect benefits.

The Plan before the Court in this action, namely, the LOCA EBT, operated under the Trust Agreement and SPD for the employees and dependents of LOCA's member companies. As shown above, the Trust Agreement was written to conform with ERISA's requirements for providing benefits to intended beneficiaries, a source of financing, and trustee responsibilities under the plan. The SPD provided a schedule of benefits for plan participants and their dependents, definitions of terms, a statement of ERISA rights, an itemization of employee and dependent health benefits, and a procedure for filing claims with and receiving payment therefor from the LOCA EBT. The Plan actually paid millions of dollars to health care providers for the accounts of participants and beneficiaries of the Plan. The Court therefore concludes that the LOCA EBT was a "plan, fund, or program" within the meaning of

§ 1002(1), and was specifically recognized as such by LOCA, LOCA EBT, its Trustees, and ISC.

The court in *Dillingham* went on to observe:

> "Established or maintained" appears twice in the definition of an employee welfare benefit plan [ERISA § 3(1), 29 U.S.C. § 1002(1)]: first, an employer or employee organization or both must establish or maintain a plan, fund, or program, and, second, the plan, fund or program must be established or maintained for specified purposes. In many instances a plan is established or maintained, or both, in writing. It is obvious that a system of providing benefits pursuant to a written instrument that satisfies ERISA §§ 102 and 402, 29 U.S.C. §§ 1022 and 1102, would constitute a "plan, fund or program."

688 F.2d at 1372. That the LOCA Plan was "established or maintained" is evidenced by its plan documents discussed above; the fact that the Plan was intended by all the parties, as evidenced by the pleadings in this and in state court, to provide life and health benefits to participants and beneficiaries; and that it did so in accordance with the plan documents. That the Plan was established and maintained by "an employer or employee organization or both" is found in ERISA's definitions.

ERISA § 3(5), 29 U.S.C. § 1002(5), defines "employer" as "any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan; *and includes a group or association of employers acting for an employer in such capacity.*" (Emphasis added.) The word "person" is defined as "an individual, partnership, joint venture, corporation, mutual company, joint stock company, trust estate, unincorporated organization, association, or employee organization." ERISA § 3(9), 29 U.S.C. § 1002(9). *See also* ERISA § 3(16), 29 U.S.C. § 3(16) ["administrator" and "plan

sponsor"], and § 3(40)(A), 29 U.S.C. § 1002(40)(A) ["multiple employer welfare arrangement"].

The Court concludes that LOCA, being a corporate association of employers and acting in the interest of such employers in creating, administering and operating the LOCA Plan, is an "employer" under the Act.

The term "employee organization" is defined by ERISA § 3(4), 29 U.S.C. § 1002(4), as "any . . . organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan . . . ."

The LOCA Trust was formed under the Internal Revenue Code, 26 U.S.C. § 501(c)(9), which exempts from taxation certain defined entities, including:

> Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the member of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

Pursuant to the terms of the Trust and Internal Revenue Code, the Court concludes that the Trust is an "employee organization" as defined by ERISA.

The documentary evidence in the record demonstrates that the Trustees, LOCA and LOCA EBT intended to create a Plan subject to ERISA and that they have in at least one other court of competent jurisdiction maintained that the Plan was governed by ERISA. The Plan's attorneys created the Plan as a tax-exempt organization, and presumably the employers took appropriate deductions for their contributions to the Plan

and the Plan did not pay taxes on its receipts. It is also clear from the pleadings filed in state court that their attorneys in this action believed that the Plan was governed by ERISA, at least until this action was filed in federal court.

From the foregoing, the Court concludes that the LOCA Plan, which provided medical, surgical, hospital and other benefits to its participants, and which was created and maintained by both an "employee organization" and by an "employer," under the provisions of ERISA and intended by its sponsor, fiduciaries, trustees, accountants, and attorneys to be governed by ERISA, falls within the coverage of that Act.

APPLICATION OF ERISA TO ACTIONS OF FIDUCARIES

Congressional intent in enacting ERISA is disclosed by the Act itself:

> It is hereby declared to be the policy of this Act to protect . . . participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation *for fiduciaries of employee benefit plans*, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

29 U.S.C. § 1001(b) (emphasis added). *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39, (1987), *rev'g* 770 F.2d 1311 (5th Cir. 1985); *Moore v. Provident Life & Accident Ins. Co.*, 786 F.2d 922, 925 (9th Cir. 1986); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981).

ERISA § 401(a), 29 U.S.C. § 1101(a) provides:

> This title shall apply to *any* employee benefit plan if it is established or maintained — (1) by any employer engaged in commerce or in any industry or activity affecting commerce . . . .

(Emphasis added.)

To the extent that any of the claims or allegations now before the Court involve alleged breach of fiduciary responsibility, ERISA governs such claims.

It appears that the core of the dispute among the parties is this: Who was responsible for establishing the "plan participant rates" (funding levels) to be charged so that the Plan would have adequate funds to pay its anticipated expenses and medical claims? LOCA and the Trustees claim this was the responsibility of Felton and ISC and that USB and Harbor are also responsible both directly and vicariously. Felton and ISC claim that LOCA and the Trustees were responsible for this task.

ERISA § 402, 29 U.S.C. § 1102, provides in part as follows:

> **ESTABLISHMENT OF PLAN**
>
> (a) **Named fiduciaries.** (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.
>
> . . .
>
> (b) **Requisite features of plan.** *Every employee benefit plan shall*
>
> (1) provide a procedure for establishing and carrying out a *funding policy and method* consistent with the objectives of the plan and the requirements of this title,

> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan . . .
>
> . . .
>
> (4) specify the basis on which payments are made to and from the plan.

(Emphasis added.)

It is therefore clear that providing for the Plan's funding policy and method, which function ERISA requires to be set out in the plan documents and to be allocated by the plan to the plan fiduciaries, is precisely the same issue as generates the controversy now before the Court.

ERISA therefore expressly governs not only the LOCA Plan and the actions of the Plan fiduciaries, but also the very issues over which the parties contend as well as the interpretation of the Plan documents which allocate responsibility for effecting the Plan.

WHO ARE FIDUCIARIES?

For purposes of the motions for summary judgment made by LOCA, the Plan, and Andrus Insurance, the Court need only review the allegations of the pleadings in federal and state court to determine who is alleged to be a fiduciary.

The term "fiduciary" is defined by ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A):

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or

discretionary responsibility in the administration of such plan. . . .

1. *LOCA*

In the Service Agreement, LOCA agreed to be the Plan Sponsor and Administrator, with "absolute authority" for the Plan. Having such authority, LOCA was a fiduciary to the Plan to the extent of the obligations imposed upon it by the plan documents and to the extent of its exercise of any other discretionary responsibility. *See* 29 U.S.C. §§ 1104(a)(1)(D), 1002(21)(a). *See also Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979).

2. *LOCA Trustees*

The Trustees were charged by the Trust Agreement at least with overseeing expenditures from the Trust. They are therefore fiduciaries to the Plan by virtue of the provisions of 29 U.S.C. § 1103(a), in that they were invested by the Act itself with "exclusive authority and discretion to manage and control the assets of the plan . . . ." *See Donovan v. Daugherty*, 550 F. Supp. 390 (S.D. Ala. 1982).

3. *Income Security Corporation*

Under the Service Agreement, ISC had the responsibility for the administration of claims, obtaining adequate stop-loss insurance as directed by the Plan Sponsor, and estimating the first year's "estimated claims cost."

In its complaint ISC admits it was a fiduciary to the Plan. It had discretion to approve or deny claims by plan participants under policies and practices antedating its association with the LOCA Plan. ISC received and disbursed trust moneys, accounted to the Trustees therefor, and advised the Trustees as to claim procedures. It regularly attended and participated

in meetings of the Plan's Trustees, principally through its president, plaintiff Felton.

LOCA and Andrus Insurance argue that ISC, as Plan Supervisor, was not a fiduciary to the Plan, citing *Munoz v. Prudential Life Ins. Co.*, 633 F. Supp. 564 (D. Colo. 1986). However, in *Munoz,* defendant Prudential, as a contract provider of administrative claims service to the plan, mechanically applied claims procedures designed and drafted by the plan sponsor. Prudential was not responsible for the denial of claims as stated in its administrative services agreement with the plan sponsor. The court wrote:

> . . . As that section [29 C.F.R. § 2509.75-8, D-2] and 29 U.S.C. § 1002(21)(A)(1) indicate, it is a person's ability to make policy decisions outside of a pre-existing or separate framework of policies, practices and procedures which saddles that person with ERISA fiduciary liability. . . .

633 F. Supp. at 568 (emphasis added).

In the case at bar, unlike *Munoz,* ISC used its own discretion in allowing or denying claims, and did not follow any procedure or guidelines established by others in deciding claims. *Munoz,* therefore, is contrary to the contention by LOCA, the Plan, and Andrus Insurance that ISC was not a fiduciary. *See also Light v. Blue Cross and Blue Shield of Ala., Inc.*, 790 F.2d 1247 (5th Cir. 1986).

Additionally, the cases interpreting ERISA establish that advisors with special expertise, such as ISC had in the area of claims' administration and adjudication, are fiduciaries. In *Eaton v. D'Amato,* 581 F. Supp. 743 (D.D.C. 1980), the third party administrator ["TPA"], like ISC, was required to process and adjudicate claims for medical care, to summarize the status of funds on a monthly basis and to report to the trustees. But

unlike ISC, the TPA claimed such functions were merely ministerial and that it operated within a tight framework of rules. Holding that the TPA was a fiduciary, the court wrote:

> Applying a restrictive judicial gloss to the term "fiduciary" itself would, in effect, enable trustees to transfer important responsibilities to a largely immunized "administrative" entity. A clear congressional desire to expand the scope of fiduciary standards of conduct should not be so undermined.
>
> As the Conference Report makes clear, Congress fully expected this definition [of fiduciary, 29 U.S.C. § 1002(21)(A)] to encompass consultants and advisors whose special expertise leads them to formulate and act on discretionary judgments while performing administrative funtions not otherwise contemplated as fiduciary. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess. 323 (1974) (Conf. Report) *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5103.

581 F. Supp. at 746. *See also Blue Cross & Blue Shield of Ala. v. Peacock's Apothecary, Inc.*, 567 F. Supp. 1258 (N.D. Ala. 1983); *Austin v. General American Life Ins. Co.*, 498 F. Supp. 844 (N.D. Ala. 1980); *Rehabilitation Inst. of Pittsburgh v. Blue Cross and Blue Shield of Northern W. Va.*, 5 EBC 2265 (W.D. Pa. 1984).

ISC's responsibility for furnishing the first year's "estimated claims cost" and obtaining adequate stop-loss insurance are likewise sufficient to render ISC a fiduciary to the extent of these duties. *See Brink v. LaLesio*, 496 F. Supp. 1350 (D. Md. 1980), *rev'd on other grounds*, 667 F.2d 420 (4th Cir. 1982).

The allegations of the petitioners in state court are of equal importance in considering this matter. In the state court ac-

tions, the petitioners have alleged that ISC and Felton had either contractual or de facto responsibility for the entire formulation, administration and implementation of the Plan. ERISA clearly states that a person may be a fiduciary if he has discretionary authority or exercises any discretionary control in respect to management or administration of a Plan.

In light of ERISA's definition of fiduciary quoted above, ISC's use of its own claim procedures, its own admission that it was a fiduciary to the extent it performed claims administration, the fact that it had contractual responsibility for providing the first year's "estimated claims costs" and for obtaining insurance for the Plan, the fact that LOCA named ISC a fiduciary to the Plan in the Forms 5500 filed each year with the Internal Revenue Service, and the allegations of LOCA and LOCA EBT in the state court, this Court must conclude that ISC is a fiduciary for purposes of these motions.

4. *Felton*

The determination whether Mr. Felton is a fiduciary must await further proceedings. He denies that he is a fiduciary, but in their state court pleadings LOCA and Andrus Insurance allege that he is, thus presenting a question of law and material fact.

5. *Andrus Insurance*

Andrus Insurance may also be a fiduciary under the LOCA Plan. It participated in formulating and marketing the Plan throughout its existence, an area of special expertise. In forms 5500 filed by LOCA, Andrus Insurance is denominated to be a fiduciary.

6. *USB and Harbor*

There is no documentary or other evidence at this stage from which the Court can determine the fiduciary status of USB. However, the state court petitioners allege that USB and Harbor are responsible both directly and as principals of ISC for the alleged failure of ISC to establish appropriate plan participant rates. If these allegations are proved, then USB and Harbor would both be fiduciaries. ERISA specifically provides that a person who has "responsibility" for a discretionary function is a fiduciary.

7. *Attorneys and Accountants*

The determination whether the attorneys and accountants were fiduciaries must await further proceedings and is not necessary for deciding the pending motions for summary judgment.

PREEMPTION

ERISA § 514(a), 29 U.S.C. § 1144(a), provides:

> Except as provided in subsection (b) of this section [the saving clause], the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .

The preemption clause in § 1144(a) is followed by the "saving clause" which exempts from preemption any laws of any state which "regulate insurance," § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), and the "deemer clause" which prohibits state law from deeming an employee benefit plan to be an insurance company, § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B).

As the Supreme Court wrote in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987):

> To summarize the pure mechanics of the provisions quoted above [the preemption, saving, and deemer clauses]: If a state law "relate[s] to . . . employee benefit plan[s]," it is preempted. § 514(a). The saving clause excepts from the preemption clause laws that "regulat[e] insurance." § 514(b)(2)(A). The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B).

107 S. Ct. 1552.

In *Dedeaux* plaintiff made claim for a work-related injury under his employer's long-term disability employee benefit plan, which plan was insured by defendant Pilot Life. After paying benefits to plaintiff for two years, Pilot Life cancelled his disability coverage and stopped making payments. Three more years passed during which plaintiff's coverage was reinstated and terminated several times. Plaintiff then instituted a diversity action against Pilot Life for tortious breach of contract, breach of fiduciary duties, and fraud. He sought damages for failure to provide benefits under an insurance policy, for mental and emotional distress, and other incidental damages. Plaintiff did not assert any of the several causes of action available under ERISA.

Pilot Life moved for summary judgment in the District Court for the Southern District of Mississippi on the grounds that ERISA preempted Dedeaux's state law claim for failure to pay benefits under an insurance contract. That court granted summary judgment, holding all claims had been preempted.

The Court of Appeals for the Fifth Circuit reversed, citing the Supreme Court decision of *Metropolitan Life Ins. Co. v.*

Massachusetts, 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985). In reversing the Court of Appeals, the Supreme Court analyzed ERISA and unanimously held:

> There is no dispute that the common law causes of action asserted in Dedeaux's complaint "relate to" an employee benefit plan and therefore fall under ERISA's express preemption clause, § 514(a) [29 U.S.C. § 1144(a)]. . . .
>
> Unless these common law causes of action fall under an exception to § 514(a), therefore, they are expressly preempted. . . .
>
> The Solicitor General, for the United States as *amicus curiae*, argues that Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress. . . . We agree. . . .
>
> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

107 S. Ct. 1553, 1555, 1556-57. *See also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 1546, 1548, 95 L. Ed. 2d 55 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985).

Counsel for LOCA, the Plan, LOCA EBT, and Andrus Insurance contend that state law should apply to the controver-

sy now before the Court because their allegations pertain to professional "malpractice" and are too remote or peripheral to "relate to" the LOCA Plan.

As the Court has noted, the core of the dispute among the parties concerns a function which ERISA specifically mandates to be allocated to fiduciaries by the plan documents. Therefore, a state law which "relates to" the functions of establishing a funding policy or method and funding the Plan "relate to" the Plan and are preempted by ERISA, unless based on state law which "regulates insurance."

In *Dedeaux* the Supreme Court interpreted the phrase "regulate insurance" in light of Mississippi's common law of bad faith, and applied the "common sense understanding . . . that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry." 107 S. Ct. at 1554. Further, the Surpeme Court, by analogizing the phrase "regulate insurance"of ERISA's saving clause with the phrase "business of insurance" used in the McCarran-Ferguson Act, 15 U.S.C. §§ 1101 et seq., held that a state law must "effect a spreading of policyholder risk" and "concern 'the policy relationship between the insurer and the insured,' " 107 S. Ct. at 1554-55, before such a law can be saved from preemption. None of the state law claims asserted by LOCA, LOCA EBT, and Andrus Insurance in the state court actions is directed toward the insurance industry, effects a spreading of risk, or concerns the relationship between the insurer and the insured.

Dedeaux arose out of a claim for benefits, not a claim for breach of fiduciary duty owed to the LOCA Plan. However, in light of the jurisdictional provisions of ERISA § 502(e), 29 U.S.C. § 1132(e), granting concurrent jurisdiction to state and federal courts for a claim for benefits under ERISA while all other ERISA claims, including breach of fiduciary duty, fall

within the exclusive jurisdiction of the federal courts, the reasoning of the Supreme Court in *Dedeaux* compels its application to the case at bar.

In *Dedeaux* the Supreme Court focused on congressional intent, finding the Congress intended that claims for benefits would be a matter of exclusive federal concern. This policy would make no sense unless the law of fiduciary responsibility were equally a matter of exclusive federal concern. Such intent appears clearly in the history of ERISA. *See ERISA — Fiduciary Responsibilities and Prohibited Transactions*, 308 BNA Tax Management Portfolio A-1 (1985).

The intent that fiduciary standards of conduct be a matter of exclusive federal concern is also implicitly expressed in the Act itself:

> It is hereby declared to be the policy of this Act to protect . . . participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts.

ERISA § 2(a), 29 U.S.C. § 1001(b). *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987); *Moore v. Provident Life & Accident Ins. Co.*, 786 F.2d 922 (9th Cir. 1986); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981).

Other courts have held that state law claims against fiduciaries, or involving the duties of a fiduciary in relation to their fiduciary activities in a plan are preempted by ERISA, and that only the federal court has jurisdiction to hear any such claims. *See, e.g., Authier v. Ginsberg*, 757 F.2d 796 (6th Cir.), *cert.*

denied, ____ U.S. ____, 106 S. Ct. 208, 88 L.Ed. 2d 177 (1985); *Brock v. Self*, 632 F. Supp. 1509, 1517 (W.D. La. 1986); *Retail Shoe Health Comm'n v. Reminiek*, 62 N.Y.2d 173, 464 N.E.2d 974, 476 N.Y.S.2d 276 (1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 2034, 85 L. Ed. 2d 316 (1986); *Pierce v. P.J.G. & Assoc., Inc.*, 128 Ill. App. 3d 471, 470 N.E.2d 1096 (1984); *Thomas v. Best*, 104 A.D.2d 37, 482 N.Y.S.2d 368 (1984); *Zink v. Heiser*, 109 Misc. 2d 354, 438 N.Y.S.2d 209 (1981); *Goldberg v. Caplan*, 277 Pa. Super. 47, 419 A.2d 653 (1980).

The Court therefore holds that all state law claims against fiduciaries or alleged fiduciaries in connection with their activities in the LOCA Plan are preempted by ERISA.

STANDING

We have so far concluded that the Plan is subject to ERISA; that the allegations against the principal parties to this action are in effect allegations that they are ERISA fiduciaries; that their actions which comprise the subject matter of this litigation are activities which fall within the area of fiduciary responsibility; that their activities "relate to" the employee benefit plan; and that all state laws which relate to such fiduciary functions are preempted. The Court now turns to the question of the standing of the parties to bring suit under the provisions of ERISA.

29 U.S.C. § 1132(a), provides:

> A civil action may be brought —
>
> (1) by a participant or beneficiary — (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

> (2) by the Secretary, or by a participant, beneficiary or a fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];
>
> (3) by a participant, beneficiary, fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan . . . .

Clearly, only the Secretary of Labor, or a participant, beneficiary, or fiduciary of an employee benefit plan has standing to bring an action under ERISA. (Subsections (4), (5), and (6) of § 1132(a), covering suits for violation of § 1025(c), and suits by the Secretary of Labor to enjoin violations of ERISA, to obtain equitable relief, and to collect civil penalties, are not applicable to this action.)

As indicated above, ISC appears to be a fiduciary. The claim brought herein by ISC and Felton is one for which at least ISC has standing to sue as a fiduciary under 29 U.S.C. § 1132 (a)(2) or (a)(3). It is brought and principally directed against LOCA and Andrus Insurance, also fiduciaries under the Plan.

The question whether the Plan itself has standing to sue in state court or to be sued in this federal action based upon its pleadings filed in state court is answered by § 1132(a). The Plan is not one of those entities authorized by that section to bring an action under ERISA. In *Pressroom Unions Printers Fund v. Continental Assurance Co.*, 700 F.2d 889, 891-92 (2d Cir.), *cert. dismissed*, 463 U.S. 1233, 104 S. Ct. 26, 77 L. Ed. 2d 1449, *cert. denied*, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 138 (1983), a suit by an employee benefit plan against the officers of a consulting firm engaged by the plan, the court held:

> The jurisdictional provisions of ERISA do not on their face authorize a pension fund to assert a cause of action. 29 U.S.C. § 1132(e)(1) gives the district courts "exclusive jurisdiction" of civil actions brought by the Secretary of Labor or by a participant, beneficiary or fiduciary. Similarly, § 1132(a), the Act's provision dealing with standing, states that the Secretary or a "participant, beneficiary or fiduciary" may bring an action for civil enforcement of the Act's fiduciary and other provisions.
>
> . . .
>
> It is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that courts are not to infer a grant of jurisdiction absent a clear legislative mandate. . . .

This Court agrees with the conclusion reached in *Pressroom Unions* and holds that the LOCA Plan does not have standing in this Court to commence and maintain an action as a fiduciary under § 1132(a) as it did in one of the state court cases. Of course, this holding will have little, if any, effect on these proceedings, since the Plan's trustees are named herein as parties defendants and the Plan may "be sued under this title as an entity." ERISA § 502(d)(i), 29 U.S.C. § 1132(d)(i).

JURISDICTION

1) *Diversity*

This Court's diversity jurisdiction has not been disputed by any party. ISC's complaint includes, among other claims, a claim for contractual damages. The Court thus has diversity jurisdiction at least over ISC's contractual damage claim.

2) *Declaratory Judgment*

The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, does not of itself confer substantive jurisdiction on the federal courts. It merely permits a different kind of remedy in cases for which there is an independent basis of jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 2d 1194 (1950). The basis for a federal court's jurisdiction must appear on the face of the well-pleaded complaint. *Franchise Tax Board Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 94 S. Ct. 1002, 39 L. Ed. 2d 209 (1974); *Gully v. First Nat'l Bank*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 2d 70 (1936); *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 24 L. Ed. 656 (1877).

3) *Federal Question*

(a) Exclusive Jurisdiction

ERISA § 502 (e)(1), 29 U.S.C. § 1132 (e)(1), provides:

> "Except for acts under § (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under § (a)(1)(B) of this section."

From the foregoing provisions of § 502, it can be seen that the only actions which may be brought in state courts are those under subsection (a)(1)(B), a claim by a participant or beneficiary to recover benefits, to enforce his rights, or to clarify his future rights under the terms of his plan. All other civil

actions commenced by a participant, beneficiary, or fiduciary must be brought exclusively in a federal district court. This is especially true where the claims relate to fiduciary duties. *Pierce v. P.J.G. & Assoc., Inc.*, 128 Ill. App. 3d 471, 470 N.E.2d 1096 (1984); *Zink v. Heiser*, 109 Misc. 2d 354, 438 N.Y.S.2d 209 (1981); *Goldberg v. Caplan*, 277 Pa. Super. 47, 419 A.2d 653 (1980).

(b) Declaratory Judgment Is "Appropriate Relief" under § 502

Fiduciaries to a trust have historically been permitted to obtain a declaratory judgment concerning their fiduciary obligations. *See, e.g., Bath v. Pixler*, 283 F. Supp. 632 (D. Colo. 1962). The fiduciary responsibility provisions in ERISA were intended to provide a uniform federal code of traditional fiduciary law, not fundamentally to change that law. *See* 308 BNA Tax Management Portfolio, *supra*.

Fiduciaries have been permitted to bring actions for declaratory judgment under § 502. *See, e.g., Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983). As stated in *Wong v. Bacon*, 445 F. Supp. 1177 (N.D. Cala. 1977):

> Sec. 502(a)(2) [of ERISA] was intended in part to give ERISA fiduciaries [the] option [to obtain a declaratory judgment concerning their federal fiduciary duties].

445 F. Supp. at 1185.

> If § 502(a)(2) is interpreted to incorporate the limitations of the Declaratory Judgment Act, the purposes of § 502 would be defeated. . . .
>
> . . .
>
> Under the Declaratory Judgment Act, "the granting of a declaratory judgment rests in the sound discre-

> tion of the trial court exercised in the public interest." . . . The same principle applies to actions under § 502(a)(2) of ERISA, for that section permits the court to grant relief only where it is "appropriate" and discretion has always been part of the equitable remedies, including declaratory judgments.

445 F. Supp. at 1187.

The general rule is that a federal court should refrain from rendering a declaratory judgment where the same issues of law will be decided in a pending state court action. *See, e.g., Travelers Indemnity Co. v. Boles,* 503 F. Supp. 179 (N.D. Cal. 1980), *aff'd,* 673 F.2d 1340 (9th Cir. 1982). However, the existence of a pending state action does not automatically make declaratory relief improper, especially where the state action would not be determinative of the controversy between the parties. *See Kephart v. Wilson,* 219 F. Supp. 801 (W.D. Tex. 1963), *aff'd sub. nom. Chandler v. David,* 350 F.2d 669 (5th Cir. 1965), *cert. denied,* 382 U.S.977, 86 S. Ct. 548, 15 L. Ed. 2d 469 (1966). The two guiding principles are whether the declaratory judgment action "will serve a useful purpose in clarifying and settling legal relations" and whether it "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Graw-Edison Co. v. Preformed Line Products Co.,* 362 F.2d 339, 342 (9th Cir.), *cert. denied,* 385 U.S. 919, 87 S. Ct. 229, 17 L. Ed. 2d 143 (1966). *See also* 10 Wright, Miller & Kane, Federal Practice and Procedure § 2759 (1983).

A declaratory judgment action brought by fiduciaries in an ERISA plan to declare their rights and liabilities is appropriate under the Declaratory Judgment Act and under ERISA, despite the pendency of an action in state court, since the declaratory judgment action is totally independent of any state court claim.

Nachwalter v. Christie, 538 S. Supp. 742 (S.D. Fla. 1982). *Cf. Wong v. Bacon*, 445 F. Supp. 1177 (N.D. Cal. 1977).

The restated petitions filed in state court by LOCA, the Plan, and Andrus Insurance essentially allege breaches of fiduciary duty owed to an ERISA-governed employee benefit plan by entities engaged to perform contractual services for that plan. To the extent based on state law, these claims are clearly preempted. To the extent they are based on federal law, the federal courts have exclusive jurisdiction over the matter.

As the Supreme Court has stated in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, 103 S. Ct. 2841, 2854, 77 L. Ed. 2d 420, ____ (1983), "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."

In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 1546, 1548, 95 L.Ed. 2d 55 (1987), the plaintiff raised state contract and tort claims in his complaint filed in state court based upon common law of general application that is not a law regulating insurance. In considering the propriety of removal, the question unanimously decided by the Supreme Court was whether the plaintiff's state common law claims were not only peempted but also *displaced* by ERISA's civil enforcement provision, 29 U.S.C. § 1132. The Supreme Court held:

> Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. . . . One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area, that any civil complaint raising this select

group of claims is necessarily federal in character. . . .

> There is no dispute in this case that Taylor's complaint, although preempted by ERISA, purports to raise only state law causes of action. The question therefore resolves itself into whether or not the *Avco* [*Corp. v. Machinists*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968)] principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by § 501(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)] as an action arising under federal law. . . .
>
> Even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, . . . however, we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. But the language of the jurisdictional provisions closely parallels that of § 301 of the LMRA. . . .
>
> Accordingly, this suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress. . . .

It appears that there is simply no reason for the Court to refrain from exercising its discretion to enter a declaratory judgment. The state law claims are preempted and the state court has no jurisdiction to decide them. Thus, any decision by the state court would be without jurisdiction, and the ERISA claims would have to be litigated again in federal court. The state court petitions have stated a federal cause of action, whether or not that is the result intended by the state court

petitioners. The failure of this Court to hear this case now will only result in duplicative and expensive litigation.

The Court therefore concludes that the restated petitions filed by LOCA, the Plan and Andrus Insurance, about which plaintiffs seek to have this Court declare the rights and obligations of the parties, are federal in character even though purportedly bottomed on state law causes of action. Since the restated petitions involve federal questions under ERISA, this court has exclusive jurisdiction over the subject matter of the complaint for the adjudication of the ERISA actions brought by LOCA, the Plan, and Andrus Insurance in state court.

PENDENT JURISDICTION

In their restated petitions filed in state court, LOCA and the Plan assert a claim against Harbor arising out of the stop-loss insurance contract between them. This claim is independent of the ERISA causes of action and essentially amounts to an insurance contract dispute between LOCA as the Plan's sponsor and administrator, Harbor as the carrier, and USB as the intermediary which placed the coverage with Harbor. As such it could be litigated in state court since it does not *necessarily* fall within the scope of ERISA.

The alleged breach of the stop-loss insurance agreement by Harbor and USB is secondary to LOCA's claims for the alleged breach of fiduciary duties owed to the plan by ISC, Felton, USB and Harbor. However, the state court pleadings do not make a clear distinction between the claims on the insurance contract and the claims based on alleged breach of fiduciary duty. It is clear that all such claims arise out of a common factual pattern, such that one would expect to try all issues in the same court. It is also clear that the same witnesses and the same evidence will be introduced on this claim, as well as on the ERISA claims.

This Court shall therefore exercise pendent jurisdiction of the breach of contract claim since it arises out of the same transactions and occurrences precipitating the claims for alleged breach of fiduciary duty owned to LOCA's Plan. When a federal court has exclusive jurisdiction over a portion of a party's claim because that claim is governed by ERISA, it may exercise pendent jurisdiction over remaining claims, which involve only state law. *See, e.g., Clorox Co. v. United States District Court*, 779 F.2d 517 (9th Cir. 1985).

INJUNCTION

Plaintiffs ask this Court to stay state court proceedings. In view of the court's findings that it has jurisdiction over all claims in this proceeding, the court will therefore stay the actions commenced in the 15th Judicial District Court, Lafayette Parish, Louisiana, docket numbers 84-1140C and 84-1162C.

NOW, THEREFORE, IT IS ORDERED that the Motions to Strike Complaint and for Summary Judgment filed by defendants LOCA, the Plan, and Andrus Insurance on the grounds that this Court lacks jurisdiction of the subject matter, be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED that plaintiffs' Motion to Stay State Court Proceedings is hereby GRANTED.

IT IS FURTHER ORDERED that this ruling involves a controlling question as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and that the parties may therefore make an appli

tion for such an appeal within ten (10) days of this order, pursuant to 28 U.S.C. Section 1292(b).

Opelousas, Louisiana. 28 September, 1987.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered 9-29-87
By Trelvis Moore
Copy To Roy; Titus; Leonard;
Kuehne; Counse;
Jackson/Gooch;
Salley; Perret;
McElligott; Roy/Rutledge;
Schonekas;

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

INCOME SECURITY CORPORATION,
INC., ET AL

VS. CIVIL ACTION NUMBER 86-1664

LOUISIANA OILFIELD
CONTRACTORS ASSOCIATION,
INC., ET AL SECTION O - JUDGE SHAW

RULING

Now before the court is the motion of plaintiffs Income Security Corporation, Inc. ("Income Security") and Gary Felton for summary judgment. Defendants U.S. Benefits, Inc. ("U.S. Benefits"), Harbor Insurance Company ("Harbor"), and R.L.I. Insurance Company have also filed a motion for summary judgment against plaintiffs.

The procedural history of the case is as follows. In early 1984, two civil actions against plaintiffs were commenced in the Fifteenth Judicial District Court, Lafayette Parish, Louisiana. Defendants Louisiana Oilfield Contractors Association ("LOCA") and the employee benefit plan it sponsored ("the Plan") or ("the LOCA Plan") commenced one of the suits, and defendant Dwight W. Andrus Insurance, Inc. ("Andrus Insurance") commenced the other suit. Originally, Andrus Insurance had been a party defendant in LOCA's action, but within thirty days Andrus Insurance settled with LOCA, pursuant to a "Mary Carter" agreement. Thereafter, Andrus Insurance commenced its own action against plaintiffs. The claims

of LOCA, the LOCA Plan, and Andrus Insurance were claims for the alleged breach of fiduciary duty and negligent performance of that duty, owed to the Plan by Income Security, Gary Felton, U.S. Benefits, and Harbor. The claims were also for misrepresentation, breach of contract, breach of covenant of good faith and fair dealing, and other state law claims.

Plaintiffs Income Security and Gary Felton commenced the instant action in this court for declaratory judgment as to the claims against them filed in state court by LOCA, the Plan, and Andrus Insurance on the grounds that (1) the LOCA Plan and the claims arising thereunder are governed exclusively by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA"); and (2) that LOCA, its trustees, accountant and attorney, and Income Security, U.S. Benefits, and Harbor are fiduciaries to the Plan, as defined by ERISA.

After LOCA, the Plan, and Andrus filed answers in these proceedings, plaintiffs moved the court to stay the state court proceedings. On September 28, 1987, the court ruled that it has exclusive jurisdiction over the parties and subject matter jurisdiction of all claims arising under ERISA. The court then assumed jurisdiction over the remaining matters pending in the state court proceedings, under the doctrine of pendent jurisdiction, and stayed all further state court proceedings. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987); *Hermann Hosp. v. Meba Medical & Benefits Plan*, Slip Op. No. 87-2672 (5th Cir. May 26, 1988).

The facts of this case are as follows. This case arises out of the decision by defendant LOCA to create a medical and life benefit plan for its members. LOCA is a non-profit corporation organized prior to 1981, to provide information and expertise in areas of interest common to its members, which are companies involved in oilfield service. Although member-

ship in LOCA is voluntary, such membership requires the payment of dues.

According to the state court pleadings of LOCA, the Plan, and Andrus Insurance, all of which have been adopted by this court, LOCA contacted Andrus Insurance, a general insurance agency, for assistance in formulating the Plan. Andrus Insurance then sought the assistance of Income Security, which was and is a contract provider of administrative claims services for single and multi-employer benefit plans. Plaintiff Gary Felton is President of Income Security.

The Plan was offered to LOCA's member-employers on a voluntary participation basis. In general, the Plan involved the contribution by member-employers to a common fund in the form of a trust, from which the trustees paid claims submitted by participants in the Plan, expenses incurred by the Plan for stop-loss insurance premiums, and fees for providers of service to the Plan.

In summary, the allegations made by LOCA and the LOCA Plan relate to two breaches of fiduciary duty by Income Security and Felton, the performance of which LOCA and the Plan allege to have been the responsibility of Income Security and Felton: (1) the failure to set adequate funding rates to be charged to the participants in the LOCA Plan, which led to the Plan's payment of claims that should have been borne by Harbor under the reinsurance agreement, had the rates charged been sufficient to invoke the reimbursement provisions of the reinsurance agreement; and (2) the failure to include weekly indemnity benefits as part of the coverage to be provided by the reinsurance agreement. Income Security and Felton allege that LOCA had the sole responsibility to set funding rates and to assure coverage of weekly benefits under the reinsurance policy with Harbor.

29 U.S.C. § 1113(a) states:

> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the *earlier* of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, *or*
>
> (2) *three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;*
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. (emphasis added).

29 U.S.C. § 1113(a).

The evidence presented to the court indicates that the Trustees of the LOCA PLan knew in May, 1983, at the latest (1) that the funding rates set for the first year of the Plan were too low; (2) that the deficit at the end of the first Plan year and at the end of the eighteenth month of the Plan was caused by the rates having been set too low; (3) that weekly indemnity coverage was not included in the Harbor reinsurance contract; and (4) that the Trustees' fixed principal responsibility for the low funding rates, the deficit caused thereby, and the failure to include weekly indemnity coverage upon Income Security and Felton.

During the August, 1982 regular monthly meeting of the LOCA Trustees, Dan Frugé, a certified public accountant, was engaged by the Trustees to perform duties as auditor for the LOCA Plan. At the Trustees' regular monthly meeting on November 30, 1982, Frugé noted that the Plan had a deficit at the end of the first plan year, October 1, 1981, through September 30, 1982, of $235,000 and "explained that the Trust was underfunded in year one by $370,000 under the theory that minmum [sic] funding should be to the aggregate attachment point." Frugé also explained the reason for the underfunding, and offered suggestions to solve the underfunding problem.

At the December 20, 1982 meeting of the Plan's Trustees, Frugé revised his November analysis of the Plan's first year deficit upward to $350,000, in order to take into account the accrual of estimated claims incurred but not reported and to present the Trust's financial statements on a full accrual basis of accounting. Frugé also indicated under what conditions the Plan would not have a fund deficit on September 30, 1983. Frugé further discussed future funding and rate increases for plan participants. At the January, 1983 Trustees' meeting, Frugé again noted the funding deficit of approximately $370,000, and explained some of the reasons for this deficit.

Frugé has testified that he first advised the LOCA Trustees of insufficient funding levels for the Plan in late 1982, in the regular meeting held in November and again in his own office on December 7, 1982. The Trustees later asked Frugé to review the funding problem as of the end of the Plan's eighteenth month, March 31, 1983, which Frugé did during April and early May, 1983. As a result of his financial review, Frugé prepared and issued a letter to the LOCA Plan Trustees, dated May 13, 1983. In that letter, Frugé indicated that the net working capital deficiency was $540,484; that the pro-

blem was getting worse; that funding projections were inaccurate; that funding rates should be increased; and that the assistance of an actuary would be needed to formulate a new rate structure.

Due to the gravity of the LOCA Plan's financial situation presented in Frugé's May 13, 1983 letter, the Trustees met on May 20, 1983, in what was denominated an "emergency meeting", to discuss the $551,000 funding deficit as of March 31, 1983. In that meeting, it became clear that Frugé had arrived at an opinion as to the Plan's financial status which differed markedly from that of Income Security and Felton; that the Plan had been using a very simplistic rate structure; that Income Security and Felton, as third party administrator, did not have the capability of keeping tract of rate structures for individuals; that the actuarial work of setting the initial rate structure for the Plan had been allocated to Income Security and Felton; that Income Security, and U.S. Benefits had assured the Trustees that the Plan had proper funding to go beyond the aggregate; that Income Security and Felton determined the rate to be charged to participants in the LOCA plan; that the Trustees proposed to replace Income Security and Felton with North American Underwriters as the Plan's third party administrator; and that Income Security and Felton were incapable of administering the LOCA Plan.

Also in the meeting of May 20, 1983, during closed session attended by one of the Trustees and counsel, attorneys for the LOCA Plan discussed that the Plan's funding problem seemed to be the result of some problem with the actuarial work that was done; that the Plan was governed by ERISA; that Income Security, Felton, and Andrus Insurance were at fault in making calculations for setting the rates; that Income Security and Felton did not know how to calculate the participation rates and had a million dollar policy of insurance for errors and omission coverage; that Andrus Insurance, as the

Plan's Managing General Agent, might also be liable for the rate miscalculation; that as to potential liability for the miscalculated rates , Income Security, Felton, and Andrus Insurance, "as co-fiduciaries in that thing, are probably going to take the fall together if anybody ever has to take a fall"; that Income Security and Felton should be replaced as third party administrator, possibly by Andrus Insurance; that Income Security should be warned: "Mr. Felton . . . you've got some serious problems. And we're going to be looking to you and your insurance company to take care of those problems, if we don't get this matter resolved and get it resolved immediately"; that the Fruge letter of May 13, 1983, was "a watershed letter. Because it tells you that, remember the old problem that we thought we solved — well, we didn't solve it. You weren't told that until May 13, because all of us here were, even as of the last meeting, convinced that everything was going to be fine"; and that the Trustees relied on Felton and Income Security "to provide a certain expertise in the resolution of the problems in the past, and are relying on the expertise of your organization and in good faith to resolve the existing problems that we are all aware of".

In the joint meeting of the LOCA directors and the Trustees of the LOCA Plan on June 27, 1983, Vance Andrus, the attorney for the LOCA Plan, noted that the Trustees could sue Income Security and Felton, who had one million dollars worth of error and omissions coverage for negligence. In the joint meeting of LOCA's directors and the Plan's Trustees, held on July 25, 1983, counsel to the Plan suggested that the Trustees write Felton a letter to put him on notice that he is "responsible for this deficiency at least in part, through his original continuing professional errors in judgment and that we're placing him on notice right now, that should there be any litigation that we will look to him."

Randy Haynie, a Plan Trustee, testified that it was in May, 1983 that he, "as a Trustee, finally realized Dan Frugé's audit is right, Gary Felton's premium, as well as U.S. Benefits, calculations were not right"; that Frugé's "system of accounting to do the audit was a lot different from Gary's [Felton's] system of accounting was set up for, to give him the numbers he wanted"; and that Felton's calculations on having the Plan fully funded with excess insurance was not correct. Roney Guidry, another Plan Trustee, testified that it was the whole Board of Trustees' decison to terminate Felton and Income Security, and that even in October, 1982, they knew that Income Security and Felton had problems with the Plan. Finally, the testimony of Malcolm Gordon and George Crain, Jr. further indicates that the Trustees knew of the Plan's financial problems at the latest in May, 1983, and that Income Security and Felton were thought to be responsible for having caused those problems.

The Trustee's knowledge, manifested in May, 1983, started the three-year statute of limitations running. Although LOCA and the LOCA Plan commenced litigation in early 1986 in state court under state law theories of action, such action did not toll the running of the ERISA federal statute of limitations, where the action must be brought exclusively in federal court. In *United States v. Maryland Casualty Co.*, 573 F.2d 245 (5th Cir. 1978), a subcontractor filed a Miller Act action in state court, but later filed its action in the United States District Court for the Eastern District of Louisiana after the Act's limitations period had expired. The court stated:

> The district court dismissed Harvey Gulf's claim for failure to file within the limitations period, 40 U.S.C. § 270b(b). Harvey Gulf urges, however, that it did file suit within one year in Louisiana state court. Although jurisdiction over Miller Act claims is exclusively federal, Harvey Gulf contends that its

> timely filing of suit, even in a court that lacked jurisdiction, interrupted the running of the limitations period.
>
> The district court properly rejected Harvey Gulf's position. The rights created by the Miller Act are federal in nature and scope [citation omitted], and federal law controls the computation of the limitations period.
>
> In principle, this is consonant with the thesis that, because the right is federal in nature, the filing of suit in a non-federal jurisdiction does not toll the statute.

573 F.2d at 247. *See also Price v. United States*, 466 F. Supp. 315, 318 (E.D. Pa. 1979) ("It is well settled that the commencement of an action in state court has no effect on the running of the statute with respect to an action filed later in federal court."); *Weed v. East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713, 719 (N.D. Tex. 1983) ("where a right is federal in nature, the timely filing of a suit in a forum without jurisdiction over it does not interrupt the running of the limitations period.")

The principle enunciated in the preceding cases clearly illustrates that LOCA's state court action did not toll the runnig of ERISA's three-year limitation period, which expired in May, 1986, two months before the commencement of this action for declaratory judgment by Income Security and Felton. LOCA counters this conclusion by arguing that equitable tolling applies to the period of limitations in ERISA. LOCA directs the court to *United States v. Fidelity and Deposit Co. of Maryland*, 813 F.2d 697 (5th Cir. 1987), where the Fifth Circuit stated:

> The Supreme Court has made it very clear that classification of a statutory limitation as substantive

> rather than procedural does not preclude its enlargement under equitable principles of estoppel.

Id. at 699.

The court finds that the equitable principle of estoppel, applied by the Fifth Circuit in the above case, clearly does not apply in the instant case. In *United States v. Fidelity and Deposit Co. of Maryland*, 813 F.2d at 698, appellants argued that appellees were estopped from relying upon the one-year limitation period of the Miller Act, because appellees had repeatedly advised appellants that appellees would pay appellants' bills. Thus, appellants relied upon appellees' misrepresentations in deciding to postpone commencement of suit. The Fifth Circuit remanded, ordering the district court to determine whether it should apply equitable principles of estoppel to the one-year statute of limitations.

LOCA argues that it falls within the scope of equitable principles of estoppel. Dan Frugé, who was on LOCA's board of trustees, testified by affidavit:

> From my first involvement with this program through March of 1983, Mr. Felton always maintained that the first year underfunding was not a major problem and that the underfunding was being corrected in the second plan year. In the months of January, February and March of 1983 Mr. Felton repeatedly reported to the Board of Trustees that claims were low and that cash flow was improving and further that the underfunding situation was being cured. It was not until May of 1983 that Mr. Felton finally admitted the severity of the situation.

Felton's assurances to LOCA do not create an equitable estoppel to ERISA's three-year statute of limitations period. In early 1986, when LOCA filed suit in state court, LOCA clearly no longer believed the veractiy of Felton's assurance.

LOCA did not miss filing suit within the three-year statute of limitations period because of Felton's assurance; rather, LOCA merely filed in the wrong court, notwithstanding that this suit was filed within the three-year limitations period. The federal suit for declaratory judgment, filed by Income Security and Felton was not commenced until two months after the three-year limitations period had expired. Obviously, LOCA was in no way prejudiced by Felton's assurances. LOCA merely filed its suit in the wrong court. Such an action cannot be justified by equitable estoppel. Thus, the motion for summary judgment by Income Security and Felton must be granted.

The court further finds that the motion for summary judgment by U.S. Benefits, Harbor, and R.L.I. Insurance Company against Income Security and Felton is moot. Income Security and Felton had filed a claim against U.S. Benefits and Harbor, seeking indemnity from these parties in the event that Income Security and Felton were held to be liable to LOCA. Income Security and Felton, however, stated no specific claim against R.L.I. Insurance Company. Because the court has found that Income Security's and Felton's motion for summary judgment against LOCA is meritorious, the motion for summary judgment by U.S. Benefits, Harbor and R.L.I. Insurance Company is moot.

Accordingly, the motion of Income Security Corporation, Inc. and Gary Felton for summary judgment is hereby GRANTED, and the motion of U.S. Benefits, Inc., Harbor Insurance Company, and R.L.I. Insurance Company for summary judgment is hereby MOOT.

Counsel for Income Security Corporation, Inc. and Gary Felton shall submit a judgment in accordance with this ruling within ten (10) days.

Opelousas, Louisiana, June 8, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 6-8-88
BY: DG
TO: Roy
Titus
Leonard
Kuehne
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

INCOME SECURITY CORPORATION INC., and GARY FELTON	:	CIVIL ACTION NO. CV86-1664
VERSUS	:	SECTION O, JUDGE SHAW
LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., ET AL	:	MAGISTRATE METHVIN

JUDGMENT

This action is now before the Court for entry of a final judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure. The Court's Ruling filed herein on June 8, 1988, which Ruling is adopted and incorporated herein by reference, recites the procedural history of this case. The multiple claims, counter-claims, and cross-claims made by the parties in this action and in the two civil actions commenced in the 15th Judicial District Court, Lafayette Parish, Louisiana, and over which the Court found jurisdiction by its Order filed September 28,1987, are or have been disposed of as follows:

1.

As to all claims made in the 15th Judicial District Court, Lafayette Parish, Louisiana, by defendants Louisiana Oilfield Contractors Association ("LOCA") and the employee benefit plan it sponsored ("the Plan") or ("the LOCA Plan"), the Court by its Ruling filed on June 8, 1988, allowed plaintiffs' Motion for Summary Judgment.

2.

Plaintiffs moved to dismiss their second, third and fourth claims as against LOCA and the LOCA Plan, which motion has been granted.

3.

Pursuant to a stipulation of dismissal all claims and cross-claims between plaintiffs and defendant Dwight W. Andrus Insurance, Inc. and I.S.L.I.C., have been dismissed.

4.

All claims and cross-claims between plaintiffs and defendants U.S. Benefits, Inc., R.L.I., and Harbor Insurance Company, have been dismissed pursuant to appropriate stipulations of dismissal.

5.

All claims and cross-claims between plaintiffs and defendants Randy K. Haynie, George Crain, Jr., Wayne Bollich, Peter Borne, Ed Preis, Rodney Guidry, Malcolm Gordon, Ned Clark, Daniel Frugé, and Vance Andrus have been dismissed pursuant to an appropriate stipulation of dismissal.

6.

Plaintiffs' sixth claim for injunctive relief staying all further state court proceedings was granted by this Court's Order filed herein on September 28, 1987.

7.

The only claim remaining for adjudication in this action is plaintiffs' fifth claim for attorney's fees against defendants LOCA and the LOCA Plan made pursuant to the provisions

of 29 U.S.C. Section 1132 (g). The Court finds that the question as to whether counsel fees should be awarded to plaintiffs, and if so, how much, is distinct from the principal questions embraced in the appeal and must await final resolution in the appellate courts of such principal disputes, and that deferral of such question is proper and would not deprive the basic judgment rendered herein of its finality for appeal purposes. A resolution of any question involving attorney fees may require this court to consider the issues of statute of limitations and the liabilities of the plaintiffs to the defendants in the defense of the claim for attorney fees.

8.

The Clerk of the 15th Judicial District Court for the Parish of Lafayette, State of Lousiaina, is hereby ordered to transfer to the Clerk of the United States District Court for the Western District of Louisiana all pleadings and other documents of record filed in the Lousiana Oilfield Contractors Association, Inc. and the Louisiana Oilfield Contractors Associtaion, Inc. Employee Benefit Trust v. International Surplus Lines Insurance Company, et al, docket number 84-1140 "C", and Dwight W. Andrus Insurance, Inc. v. Income Security Corporation, et al, docket number 84-1162 "E", in the most expeditious manner possible.

The court finds that this judgment is a final judgment under Rule 54(b) of the Federal Rules of Civil Procedue.

Opelousas, Louisiana, June 22nd, 1988.

/s/ John M. Shaw
JOHN M. SHAW, United States
District Judge

APPROVED AS TO FORM:

DOMENGEAUX & WRIGHT

BY: /s/ William P. Rutledge
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ATTORNEYS FOR LOUISIANA OILFIELD CONTRACTORS ASSOCIATION INC., and LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC. EMPLOYEE BENEFIT TRUST

Judgment Entered 6-24-88
By Trelvis Moore
Copy To Clerk, 15th JDC
Roy
Titus
Leonard
Kuehne
Counse
Jackson/Gooch
Perret
McElligott
Roy/Rutledge/Wright
Schonekas
Salley

TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Plaintiff-Appellee,

v.

Leroy JACKSON, Defendant-Appellant.

Nos. 85-2583, 85-2690.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1988.

Insurer brought action for declaratory judgment and injunction with respect to state court suit against it for bad-faith refusal to pay benefits under the Longshore and Harbor Workers' Compensation Act. The United States District Court for the Eastern District of Texas, Howell Cobb, J., 618 F.Supp. 1316, granted relief and injured worker appealed. The Court of Appeals, 820 F.2d 1406, affirmed in part and reversed in part. On rehearing, the Court of Appeals, Garwood, Circuit Judge, held that: (1) Anti-Injunction Act barred the action regardless of whether state court action was preempted, and (2) if Anti-Injunction Act would bar suit, that will also bar the issuance of a declaratory judgment which would have the same effect as an injunction.

Judgment reversed and cause ordered dismissed.

Clark, Chief Judge, filed an opinion concurring specially in the majority opinion and in the opinion of Alvin B. Rubin, Circuit Judge.

Alvin B. Rubin, Circuit Judge, filed an opinion in which Johnson, Circuit Judge, joined and in which Brown and Jerre S. Williams, Circuit Judges, joined in part.

Brown, Circuit Judge, filed an opinion dissenting in part and concurring in part in which Jerre S. Williams, Circuit Judge, joined.

Appeals from the United States District Court for the Eastern District of Texas.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 15, 1987, 5 Cir., 1987, 820 F.2d 1406)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES and SMITH, Circuit Judges.*

GARWOOD, Circuit Judge:

This case involves the authority of a federal district court to enjoin the prosecution of a previously filed state court civil suit and declare the purported state law causes of action therein asserted preempted by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950.

The state suit was brought by appellant Leroy Jackson (Jackson, a workman who had been injured in the course of his LHWCA-covered employment, against appellee, Texas Employer's Insurance Association (TEIA), his employer's LHWCA insurer, seeking damages for mental

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* Judge King is recused, and therefore did not participate in this decision.

Judge John M. Duhe, Jr. was not a member of the Court when this case was submitted to the Court en banc and did not participate in this decision.

anguish, stress, and anxiety consequent on TEIA's alleged fraud and bad faith in having delayed payment of his LHWCA compensation benefits. Nearly a year later, TEIA filed this action against Jackson in the United States District Court for the Eastern District of Texas, seeking to enjoin Jackson's prosecution of the state suit and to declare that its claims were preempted by the LHWCA. Shortly before the state suit was scheduled to go to trial, the district court enjoined Jackson's prosecution of it and rendered the declaratory judgment that Jackson's state law claims were preempted by the LHWCA. *Texas Employers' Insurance Association v. Jackson*, 618 F.Supp. 1316 (E.D. Tex. 1985). Jackson appealed and a panel of this Court set aside the injunction as contrary to the Anti-Injunction Act, 28 U.S.C. § 2283,[1] but affirmed the grant of declaratory relief, which it held to be proper under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.[2] *Texas Employers' Insurance As-*

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1. Section 2283 provides:
"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

2. Section 2201(a) provides:
"(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."
Section 2202 provides:
"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

sociation v. Jackson, 820 F.2d 1406 (5th Cir. 1987). Agreeing with the former but not the latter determination, this Court en banc now holds that whether or not Jackson's claims were preempted by the LHWCA, the district court nevertheless lacked authority to issue the injunction by virtue of the Anti-Injunction Act, and that it and allied principles likewise prevented the declaratory relief sought and granted below. As the district court was not authorized to grant any of the relief sought by TEIA, we accordingly reverse the judgment below and order the case dismissed.

CONTEXT FACTS AND PRIOR PROCEEDINGS

In July 1978, Jackson injured his back and right ankle when he fell on a barge in navigable waters in the course of his employment as a shipfitter for Gulfport Shipbuilding Company (Gulfport) in Port Arthur, Texas. Jackson received medical treatment and returned to the same employment with Gulfport on October 30 of that year. Thereafter and until May 1982, Jackson continued his work as shipfitter for Gulfport, with intermittent absences from work and medical treatment on account of his July 1978 injury. On May 3, 1982, Jackson seriously reinjured his back in the course of the same employment with Gulfport, and he has not returned to work since. On July 6, 1982, Jackson filed a formal claim for total permanent disability benefits under the LHWCA. *See* 33 U.S.C. § 908.

Throughout all this time, Gulfport was an employer subject to the LHWCA, TEIA was Gulfport's LHWCA compensation insurer, and Jackson was a Gulfport employee covered by the Act. *See* 33 U.S.C. §§ 902(3), 902(4), 932(a)(1).

TEIA paid Jackson's medical expenses and temporary total LHWCA disability benefits until April 4, 1983, when it suspended payment. TEIA had previously, in late July 1982, filed a formal "controversion" of entitlement to benefits pursuant to 33 U.S.C. § 914(d) on the ground that the amount of permanent disability "is uncertain at this point" because Jackson had "not yet reached maximum improvement."[3] Payment of benefits remained suspended from April 4, 1983 until shortly after a July 6, 1983 informal conference before a deputy commissioner,[4] at which time TEIA agreed to resume payments. Jackson was medically reexamined in August 1983, and on September 14, 1983, TEIA again suspended payment of benefits and filed another controversion, this time on the ground that Jackson had reached maximum recovery and that any disability he had was not due to his injury but to an arthritic condition. Following a settlement conference at which a Department of Labor claims examiner recommended payment, TEIA, on September 29, 1983, again

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3. Section 914(d) provides in part:

> "If the employer controverts the right to compensation he shall file with the deputy commissioner . . . a notice in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, . . . and the grounds upon which the right to compensation is controverted."

Under section 914(a), LHWCA compensation is payable promptly and without an award, "except where liability to pay is controverted by the employer." Section 914(b) requires payment within fourteen days after the employer has knowledge of the injury and thereafter semimonthly. Section 914(e) provides:

> "If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section. . . ."

4. *See* 33 U.S.C. §§ 914(h), 919(c), 940.

filed another controversion objecting to that recommendation and continued to withhold benefits. Compensation remained unpaid until the final award was made in September 1984.

On May 3, 1984, Jackson's LHWCA claim was heard before a Department of Labor administrative law judge (ALJ) pursuant to 33 U.S.C. §§ 919 (c), (d), and (e). On September 14, 1984, the ALJ awarded Jackson disability benefits on account of his July 1978 and May 1982 injuries, holding that he had been totally and permanently disabled since May 3, 1982. Jackson was also granted preaward interest on accrued, unpaid benefits and attorneys' fees pursuant to 33 U.S.C. § 928(a).[5] This award was filed in the office of the deputy commissioner on September 28, 1984 and, neither party having appealed to the Benefits Review Board, became final and unappealable thirty days thereafter. 33 U.S.C. §§ 919(e), 921(a), 921(b) (appeal from the Benefits Review Board would have been to this Court; § 921(c)). TEIA promptly paid the award in full.

Meanwhile, on June 7, 1984, after the ALJ hearing but before her formal award, Jackson sued TEIA in the 60th District Court of Jefferson County, Texas. Jackson filed a First Amended Original Petition in that suit on May 1, 1985 and a Second Amended Original Petition on May 24, 1985. The suit alleged Jackson's July 1978 and May 1982 injuries and that these were covered by the LHWCA, with TEIA being the LHWCA insurance

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5. Attorneys' fees are expressly provided for by section 928(a). Interest is not expressly provided for, but apparently has been routinely awarded. The ALJ's decision expressly notes that there was no objection to the award of attorneys' fees; nor does it indicate any objection to the interest award.

carrier of Jackson's employer, Gulfport. It sought damages, actual and exemplary, on account of "mental anguish, stress, anxiety and humiliation" suffered by Jackson as a result of TEIA's allegedly fraudulent and bad faith suspension of Jackson's LHWCA compensation benefits commencing in April 1983. Jackson alleged that TEIA knowingly induced a doctor to file a false medical report concerning him on the basis of which TEIA suspended his LHWCA benefits, and that TEIA knew he was entitled to such benefits but suspended payment solely in an effort to force him to settle for far less than his claim was worth, which pressures were especially severe as Jackson's LHWCA benefits were then his and his family's sole support. There was no allegation that Jackson ever did settle, or that he did not ultimately receive all he was entitled to under the LHWCA; nor was any recovery sought of any amounts allegedly due under the LHWCA. Jackson's state court pleadings purported to assert a cause of action against TEIA in respect to these alleged facts under seven different theories of Texas law, *viz.*: a claim for false, misleading, unfair and/or deceptive acts under Article 21.21 of the Texas Insurance Code; a claim under the Texas deceptive Trade Practices Act (Texas Business and Commerce Code §§ 17.41, *et seq.*); and claims under Texas common law theories of bad faith insurance practices, fraud, intentional infliction of severe emotional distress, negligent infliction of severe emotional distress, and willful and wanton lack of care and concern for the health, safety, and welfare of others.

TEIA filed a "plea in bar," plea in abatement, and answer in the state court action on July 19, 1984. The plea in bar asserted in substance that the LHWCA preempted Jackson's claims. The plea in abatement re-

quested abatement until the LHWCA proceedings were final. In its answer, TEIA asserted, in addition to a general denial, that Jackson was not a consumer under the Texas Deceptive Trade Practices Act, that neither that statute nor the Texas Insurance Code applied to the handling of LHWCA claims, and that the LHWCA was Jackson's exclusive remedy.

On January 11, 1985, the state trial court entered an order denying TEIA's plea in bar. Extensive discovery, including the taking of several depositions, ensued in the state court suit. It was set for trial for August 12, 1985, and later reset for August 26, 1985.

On May 23, 1985, TEIA filed the instant action against Jackson in the United States District Court for the Eastern District of Texas. The only relief sought was a preliminary and permanent injunction against Jackson's further prosecution of the state court suit, and declaratory judgment that the LHWCA preempts Jackson's state law claims asserted in his state court suit and that the ALJ's September 1984 award in the LHWCA proceeding had become final and constituted *res judicata* of those claims. A copy of the ALJ's September 14, 1984 opinion and award and of Jackson's First Amended Original Petition in the state court suit were attached as exhibits to TEIA's complaint.

On August 8, 1985, the court below held a nonevidentiary hearing on TEIA's requested injunction, and on August 21, 1985, issued a temporary injunction which enjoined Jackson from further prosecution of his state suit. Jackson timely appealed. On September 30, 1985, the district court permanently enjoined Jackson from further prosecution of the state court action and declared

that Jackson's claims asserted in the state suit were preempted by the LHWCA. Jackson again timely appealed, and his two appeals were consolidated in this Court.

[1, 2] In granting the injunction, the district court ruled that the September 1984 ALJ award barred Jackson's state suit under principles of *res judicata* and hence invoked the "to protect or effectuate its judgments" exception to the Anti-Injunction Act. It also ruled that the "as expressly authorized by Act of Congress" exception to the Anti-Injunction Act was applicable by reason of section 21(d) of the LHWCA, 33 U.S.C. § 921(d). 618 F.Supp. at 1323. The panel rejected both these determinations, and held that the Anti-Injunction Act was applicable and barred the grant of injunctive relief. 820 F.2d at 1415-17.[6] We agree. The panel also held, however, that the Declaratory Judgment Act was available and that resort to it was not precluded by the Anti-Injunction Act or related principles. 820 F.2d at 1420-21 (Judge Jones dissented from this holding, 820 F.2d at 1424-26). On the merits, the panel ruled that the LHWCA preempted Jackson's state law claims. 820 F.2d at 1411-14.[7] However, as explained below, we hold that

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6. The remaining exception to the Anti-Injunction Act, the "where necessary in aid of its jurisdiction" exception, has not been urged by TEIA, was not relied on by the district court, and appears plainly unavailable. *See, e.g., Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 75 S. Ct. 452, 457, 99 L.Ed. 600 (1955); *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 97 S. Ct. 2881, 2893, 53 L.Ed.2d 1009 (1977); *T. Smith & Son, Inc. v. Williams,* 275 F.2d 397, 407 (5th Cir. 1960). When TEIA filed its suit, the ALJ's award had long since been paid in full and become final by lack of appeal, and no federal court had even potential jurisdiction over the ALJ's award or Jackson's claim for LHWCA benefits.

7. Jackson relied on *Martin v. Travelers Insurance Co.,* 497 F.2d 329 (1st Cir. 1974), in arguing that his state law claims were not preempted by the LHWCA. The panel declined to follow *Martin.*

regardless of any LHWCA preemption, the Anti-Injunction Act and allied principles prevent declaratory as well as injunctive relief respecting Jackson's pending and previously filed state suit.[8]

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820 F.2d at 1414. In a later decision, another panel of this Court likewise declined to follow *Martin* and held that a state law cause of action for bad faith failure to pay LHWCA compensation when due was preempted by the LHWCA. *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 *rehg. en banc denied*, 844 F.2d 788 (5th Cir. 1988). Our holding concerning the Anti-Injunction Act and the Declaratory Judgment Act implies no disagreement with *Atkinson*, which remains the law of this Circuit unless overruled by subsequent contrary pronouncement of the Supreme Court or of this Court en banc.

The Texas law claims asserted by Jackson are of the general type later recognized by the Texas Supreme Court in *Aranda v. Insurance Company of North America*, 748 S.W.2d 210 (Tex. 1988), which upheld a common-law action against an insurer for its bad faith in failing to timely pay benefits due under the Texas Workers' Compensation Act. In so holding, and in finding the action was not precluded by the Texas Workers' Compensation Act, *Aranda* in part relied on the "contractural nature of" the Texas Workers' Compensation Act and on the fact that "[t]he employee is thus a party to the [compensation insurance] contract." *Id.* at 212.

8. The panel also held that the district court had jurisdiction over TEIA's suit under 28 U.S.C. § 1331 because of the preemptive force of the LHWCA. 820 F.2d at 1417-20. Judge Jones dissented from this holding. *Id.* at 1422-24. The panel majority recognized that under the well-pleaded complaint rule, federal preemption is generally a defensive matter which does not give rise to federal question jurisdiction even in an action for declaratory judgment that a state law claim is preempted. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 2848, 2850, 77 L.Ed.2d 420 (1983). However, the panel majority held that here the LHWCA preemption was so pervasive and displacing as to bring the case within the rule of *Avco Corp. v. Aero Lodge No. 735, I.A. of M. & A.W.*, 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987). Judge Jones, in her dissent, viewed this as an unwarranted extension of *Avco* and *Taylor*, and considered that the case was governed by *Franchise Tax Board, Caterpillar, Inc. v. Williams*, ____U.S.____, 107 S. Ct. 2425, 2429, 96 L.Ed.2d 318 (1987), *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984), and related decisions.

INJUNCTION

General principles

Before considering the particular exception specified in the Anti-Injunction Act (note 1, *supra*), some general observations concerning it may be helpful. Justice Black in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S. Ct. 1739, 26 L.Ed.2d 234 (1970), remarked on the significance of the Act, originally passed in 1793, to "the essentially federal nature of our national government," and explained:

> "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. . . . One of the reserved powers was the maintenance of

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We need not and do not resolve this difficult issue, because we hold that even if the court below had jurisdiction and even if the LHWCA were completely preemptive, the district court nevertheless had no authority to enjoin prosecution of the previously filed and pending state action and declare its claims invalid, which was the *only* relief sought by TEIA's suit. Thus, regardless of how the jurisdictional issue is resolved, the result is exactly the same. While such pretermitting of a jurisdictional issue is rare, there is respected precedent for it in analogous circumstances. *See United States v. Augenblick,* 393 U.S. 348, 89 S. Ct. 528, 531, 21 L.Ed.2d 537 (1969) ("even if we assume, *arguendo,* that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a 'constitutional' defect in the military decision, these present cases on their facts do not rise to that level"); *Secretary of Navy v. Avrech,* 418 U.S. 676, 94 S. Ct. 3039, 3040, 41 L.Ed.2d 1033 (1974) (assuming *arguendo,* that the court below had jurisdiction, on the merits there was no entitlement to relief, and so the jurisdictional issue is not decided); *Norton v. Mathews,* 427 U.S. 524, 96 S. Ct. 2771, 2775, 49 L.Ed.2d 672 (1976) ("[W]hichever disposition we undertake, the effect is the same. It follows that there is no need to decide the theoretical question of jurisdiction in this case. In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.").

> state judicial systems for the decision of legal controversies. Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights. Others felt that a complete system of federal courts to take care of federal legal problems should be provided for in the Constitution itself. This dispute resulted in compromise. One 'supreme Court' was created by the Constitution, and Congress was given the power to create other federal courts. . . .
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> "While the lower federal courts were given certain powers in the 1789 [Judiciary] Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. . . . Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. . . . Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work . . . , it was necessary to work out lines of demarcation between the two systems. . . . The 1793 anti-injunction Act was at least in part a response to these pressures." *Id.* 90 S. Ct. at 1742-43.

Hence, Justice Black concluded, the Act's "prohibition" of injunctions against state court proceedings "in part rests on the fundamental constitutional independence of the States and their courts." *Id.* 90 S. Ct. at 1743. More recently, the Court observed in a similar vein that section 2283 "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts" and that its prohibi-

tions are "[d]ue in no small part to the fundamental constitutional independence of the States." *Chick Kam Choo v. Exxon Corp.*, ____U.S.____, 108 S. Ct. 1684, 1689, 100 L.Ed.2d 127 (1988). We, too, have recognized that, in the words of Judge Wisdom writing for a distinguished panel of this Court, "the hands-off doctrine expressed in Section 2283 is to be considered in the light of the function of Section 2283 as a pillar of federalism." *T. Smith & Son., Inc. v. Williams,* 275 F.2d 397, 407 (5th Cir. 1960) (Tuttle, Brown, and Wisdom.)

[3] Similar considerations dictate that construction and application of section 2283 is not to be influenced by any "assumption . . . that federal rights will not be adequately protected in the state courts," *Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 75 S. Ct. 452, 456, 99 L.Ed. 600 (1955), for

> "during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. . . . During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Id.* 75 S. Ct. at 456-57.

More specifically, the Court has clearly held that the only exceptions to section 2283 are those three expressly stated therein. Thus, in *Atlantic Coast Line,* the Court declared "[w]e cannot accept any . . . contention" that

"in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions," and proceeded to "hold that any injunction against state court proceedings . . . must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld." 90 S. Ct. at 1743. *See also Chick Kam Choo,* 108 S. Ct. at 1689 ("an injunction staying state proceedings is proper only if it falls within one of the statutory exceptions"); *Amalgamated Clothing Workers,* 75 S. Ct. at 454 ("the prohibition [of section 2283] is not to be whittled away by judicial improvisation"). Further, it is settled that these "exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo,* 108 S. Ct. at 1689 (quoting *Atlantic Coast Line,* 90 S. Ct. at 1743).

[4] Moreover, it is likewise established that a claim of federal preemption—even one which is unmistakably clear—is not within any of the exceptions stated in section 2283 and hence does not suffice to authorize an injunction of state court proceedings. As stated in *Atlantic Coast Line*:

> "[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. . . . This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation." 90 S. Ct. at 1743.

See also Chick Kam Choo, 108 S. Ct. at 1691 (quoting the first sentence set out above and stating "when a state proceeding presents a fedreal issue, even a preemption

issue, the proper course is to seek resolution of that issue by the state court"); *T. Smith*, 275 F.2d at 404-05. This is true whether the preemption is that of federal maritime law, *Chick Kam Choo*, or the LHWCA, *T. Smith*, or the National Labor Relations Act, *Amalgamated Clothing Workers*.

[5] Nor is the result any different because the federal preemption is such as to deprive the state court of *jurisdiction*. In *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L.Ed. 546 (1955), the Supreme Court had before it, on direct review, a state court injunction of union picketing, and stated that "[t]he principal question that the case raises" is "whether the state court had jurisdiction to enjoin" the union "or whether its jurisdiction had been preempted" by the National Labor Relations Act. *Id.* 75 S. Ct. at 484. The Court set aside the injunction, ruling that the state court lacked jurisdiction by virtue of the federal preemption. A week later, the Court decided *Amalgamated Clothing Workers*, which it described as involving a state court injunction of union conduct "under similar circumstances" to those of *Weber*. 75 S. Ct. at 453. However, in *Amalgamated Clothing Workers*, the union had procured a federal court injunction of the state court proceedings, and the issue was whether this was prohibited by section 2283. The Court noted that "[u]nder the decision in *Weber* . . . we may assume that the [union] conduct in controversy . . . is outside state authority." 75 S. Ct. at 454. It then proceeded to reject the argument that this sufficed to avoid the prohibition of section 2283:

> "[W]e cannot accept the argument . . . that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly

> without jurisdiction over the subject matter, having invaded a field pre-empted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now." *Id.* at 455 (footnote omitted).

Plainly, the Court held that a complete lack of state court subject matter jurisdiction, due to federal pre-emption, comes within none of the exceptions to section 2283 and provides no basis for avoiding the prohibition of section 2283. *Amalgamated Clothing Workers* has continued to be cited with approval for its holding in this respect. *See, e.g., Atlantic Coast Line,* 90 S. Ct. at 1747;[9] *Chick Kam Choo,* 108 S. Ct. at 1691. In *T. Smith,* we applied the above-quoted portion of *Amalgamated Clothing Workers* to conclude that section 2283 prevented a federal court from enjoining the state suit for state workers' compensation benefits of a longshoreman injured on a merchant vessel lying in navigable waters as against the argument, the validity of which we assumed, that the LHWCA and the rule of *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L.Ed. 1086 (1917), were completely preemptive of the state claims and that the case was one "involving exclusive federal jurisdiction." *See* 275 F.2d at 404-05.

[6] Finally any doubts are to be resolved in favor of allowing the state court action to proceed. As the Court stated in *Atlantic Coast Line*:

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9. We also observe that Justice Brennan, with whom Justice White joined, in his dissenting opinion in *Atlantic Coast Line, id.* 90 S. Ct. at 1748, stated: "Nor do I dispute the Court's holding on the basis of *Amalgamated Clothing Workers* . . . that federal courts do not have authority to enjoin state proceedings merely because it is asserted that the state court is improperly asserting jurisdiction in an area preempted by federal law. . . ."

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." 90 S. Ct. at 1748.[10]

Protect or effectuate its judgments

[7] The "except . . . to protect or effectuate its judgments" language of section 2283 has been referred to as the "relitigation exception." Its general function and purpose were described in *Chick Kam Choo* as follows:

> "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Id.*, 108 S. Ct. at 1690.[11]

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10. It is, of course, also "settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Id.* at 1743.

11. The wording of section 2283, as well as the "by the federal court" language in the above quotation, may suggest that the judgment to be protected must be that of a federal court. Here all that is involved is the ALJ's September 1984 award, which had become final and unappealable, and which TEIA had fully paid, long before TEIA filed this suit.

However, like the panel, 820 F.2d at 1416 n. 10, we do not decide but merely assume, *arguendo* only, that the fact that what is here involved is an ALJ award, rather than a court judgment, does not of itself necessarily preclude resort to this exception.

We note that language in *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975), may indicate that an NLRB ruling can be the basis for invoking the "relitigation exception" to section 1983. However, in *Nix*, *prior* to the federal injunction suit, the NLRB ruling had been appealed to and affirmed by this Court and also, in a separate federal district

Clearly, the ALJ award does not preclude Jackson's state suit claims under a collateral estoppel theory, and certainly not for purposes of the relitigation exception to section 2283. The ALJ award makes no determination whatever respecting the bad faith or good faith of TEIA in withholding payment to Jackson of LHWCA benefits, or of whether Jackson suffered emotional distress or the like as a result, or whether Jackson could recover damages on account thereof. Indeed, none of these matters are even alluded to in the ALJ award. Nor did Jackson ever seek any such determination or relief before the ALJ. It is plain that none of these matters were either litigated before or determined by the ALJ. Collateral estoppel, or "issue preclusion," requires, among other things, that the allegedly precluded issue have been "actually litigated and determined" in the prior action. *Restatement (Second) Judgments* § 26. *See also Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865, 867, 99 L.Ed. 1122 (1955) ("collateral estoppel . . . precludes relitigation of issues actually litigated and determined in the prior suit"); *Montana v. United States*, 440 U.S. 147, 99 S. Ct. 970, 973, 59 L.Ed.2d 210 (1979); *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 132 (5th Cir. 1975); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4419 at 177 ("[b]asic statements of the requirements for issue preclusion demand

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court suit brought by the party who was later the state court plaintiff, had been held to be preclusive of the claims subsequently raised in the state suit. Thus in *Nix*, invocation of the relitigation exception did not rest only on the NLRB ruling, or even on its judicial affirmance, but also on the prior federal district court suit judgment that the NLRB ruling precluded the claims which were raised in the subsequent state suit. *Id.*, 512 F.2d at 131.

that the issues have been both actually litigated and actually decided") (footnote omitted).

These requirements have been stringently enforced for purposes of the relitigation exception to section 2283. Thus, in *Atlantic Coast Line*, the prior federal action had denied the railroad an injunction against the union's picketing, which the railroad sought on account of alleged union violations of the Railway Labor Act and the Interstate Commerce Act, the federal district court having ruled that the Railway Labor Act granted the union the right to strike. Subsequently, the railroad procured a state court injunction against the union on the ground that its strike was illegal under state law. The union then returned to the federal court and enjoined the state proceeding, contending that the injunction was authorized by the relitigation exception to section 2283. The Supreme Court disagreed, because the prior federal action had not expressly determined that the Railway Labor Act precluded an injunction on state law grounds.[12] *Id.* In *Chick Kam Choo*, the Court reaffirmed this holding, observing that "[t]he proper scope of the [relitigation] exception is perhaps best illustrated by this Court's decision in *Atlantic Coast Line, supra.*" 108 S. Ct. at 1690. *Chick Kam Choo* goes on to state:

> "[A]s *Atlantic Coast Line* makes clear, an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court.

12. In fact, as the Supreme Court had earlier held, the Railway Labor Act *did* prevent such an injunction. *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L.Ed.2d 344 (1969).

> Moreover, *Atlantic Coast Line* illustrates that this prerequisite is strict and narrow. The Court assessed the precise state of the record and what the earlier federal order *actually* said. . . ." *Id.*[13]

Given this standard—or, for that matter, any other reasonable standard—it cannot possibly be concluded that the ALJ actually decided adversely to Jackson any of the issues presented by his state suit.

[8] TEIA contends, however, that the ALJ's award bars Jackson's state suit under the doctrine of claim preclusion, or "true" *res judicata.* While the bar of *res judicata,* in this sense, does not depend on the issues or theories actually litigated or decided in the prior case, it does require, among other things, an identity of cause of action or claims. *See, e.g., Restatement (Second) Judgments* §§ 18(1), 25; *Montana,* 99 S. Ct. at 973, 974; *Lawlor,* 75 S. Ct. at 867; *Nix,* 512 F.2d at 131. As explained in Wright, Miller and Cooper, *supra,* a single cause of action or claim cannot be "split" by advancing one part in an initial suit and attempting to reserve another part for a later suit. *Id.,* § 4402 at 8. Moreover, in determining whether a prior court judgment bars a later suit, we have generally applied a broad definition of "claim" or "cause of action," following the *Restatement* formulation in this respect. *See Nilsen v. City of Moss Point,* 701 F.2d 556, 559-62 (5th Cir. 1983); *Restatement (Second) Judgments* §§ 24, 25. TEIA urges that Jackson's state suit claims for bad faith withholding of

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13. *See also Southern California Petroleum Corp. v. Harper,* 273 F.2d 715, 719 (5th Cir. 1960) ("[A] complainant must make a strong and unequivocal showing of relitigation of the same issue" to avoid the bar of section 2283, and "[i]f we err, all is not lost. A state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel.").

LHWCA compensation benefits and resulting emotional distress are a "part of the [same] transaction, or series of connected transactions, out of which" his claim before the ALJ for the LHWCA benefits themselves "arose," *id.*, § 24(1), and are hence the same claim or cause of action for purposes of claim preclusion. Accordingly, TEIA argues that this suffices to invoke the relitigation exception to section 2283. We disagree.

It may be doubted that TEIA's argument is consistent with the statement in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S. Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), that *res judicata* applies where the administrative agency "resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Here, as noted, the ALJ resolved no disputed issues adversely to Jackson, and the issues of TEIA's bad or good faith and Jackson's emotional distress were simply not before or resolved by the ALJ, there was no opportunity to litigate them, and they were not litigated. Moreover, TEIA's argument likewise appears to be inconsistent with *Chick Kam Choo's* admonishment that the relitigation exception "is strict and narrow" so that only "claims or issues which . . . actually have been decided" in the prior proceeding as reflected by what the prior "order *actually* said" are protectable thereunder. 108 S. Ct. at 1690.

TEIA and Jackson have both consistently, and correctly, taken the position that TEIA's good faith or lack thereof in filing its controversions in the LHWCA proceedings, and its good faith or lack thereof in suspending payment of LHWCA compensation benefits pursuant thereto, were matters that were legally irrelevant to any relief Jackson was entitled to under the LHWCA or in

the proceedings before the ALJ, as was also any emotional distress Jackson suffered as a result of such suspensions, and that the ALJ had no jurisdiction to pass on, or award Jackson anything by reason of, the matters asserted in his state suit.[14] Moreover, Jackson could recover LHWCA benefits only by going through administrative proceedings as provided in the LHWCA, including the proceedings before the ALJ in which he was awarded all the relief available under the LHWCA. Thus, this case fits into a well-recognized exception to claim preclusion, as provided in *Restatement (Second) Judgments* § 26(1)(c), for instances where the relief sought or theory advanced in the first suit is cognizable only before a court of limited jurisdiction not competent to act on the theory advanced or relief sought in the second suit. This principle has particular applicability when claim preclusion is sought to be established on the basis of a prior administrative proceeding. As the *Restatement (Second) Judgments* explains:

> "The qualifications and exceptions to the rule of claim preclusion have particular importance with respect to adjudications by administrative agencies. One important qualification has to do with the definition of 'claim' itself. In the context of civil actions in courts, the term 'claim' is broadly defined. . . . This broad definition reflects the fact that in modern practice judicial tribunals usually have comprehensive authority to adjudicate all contentions of fact

14. This is not to say that the LHWCA does not preempt Jackson's state law claims. The point is that such a bar to those claims would arise from the LHWCA itself, regardless of whether there was any ALJ decision, and not from the ALJ award. That is the difference between preemption, which affords no basis for avoiding the bar of section 2283, and relitigation, which does (assuming, *arguendo*, its applicability to federal administrative determinations).

and all legal theories that may arise from a transaction. Since a judicial tribunal has such comprehensive authority, a litigant may justly be required to avail himself of that authority and to assert in a single action all factual and legal contentions that might be made. . . .

"In contrast, the jurisdiction of administrative agencies is usually defined in terms of specified substantive legal provisions, for example, workers' compensation. . . . Since the tribunal's authority is delimited in substantive legal terms, the tribunal ordinarily lacks authority to adjudicate claims arising out of the transaction in question but based upon other substantive legal premises. Thus, a workers' compensation commission usually lacks authority to consider claims for punitive damages for injuries intentionally inflicted on an employee in the course of employment. . . . These limitations on authority of the tribunal should carry corresponding limitations on the scope of 'claim' for purposes of the rule of claim preclusion.

"Furthermore, the exceptions stated in § 26(1)(c) and (d) are particularly important in considering claim preclusion with respect to an administrative agency determination. Section 26(1)(c) provides that preclusion is inapplicable to that part of a claim that is a possible basis for a second action where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the competency of the [tribunal]. . . .'" *Id.* § 83, comment *g*.

Federal courts have routinely applied these principles. *See, e.g., United States v. Radio Corporation of America,* 358 U.S. 334, 79 S. Ct. 457, 468, 3 L.Ed.2d (1959); *Parker v. Pavkovic,* 753 F.2d 1397, 1404 (7th Cir.),

cert. denied, 473 U.S. 906, 105 S. Ct. 3529, 87 L.Ed.2d 653 (1985); *Newport News Shipbuilding & Dry Dock Co. v. Director,* 583 F.2d 1273, 1278 (4th Cir. 1978), *cert. denied,* 440 U.S. 915, 99 S. Ct. 1232, 59 L.Ed.2d 465 (1979) (denial of workers' compensation benefits by Industrial Commission of Virginia not claim preclusive of entitlement to LHWCA benefits). *See also* Wright, Miller & Cooper, *supra,* §§ 4412, 4475.[15] We applied this doctrine in the section 2283 context in *Nix,* where we rejected the argument that an NLRB determination that an employee's firing was not an unfair labor practice and hence did not mandate reinstatement was claim preclusive of the employee's state court claim seeking reinstatement on the basis that the firing constituted a breach of contract, stating:

> "The fallacy of this argument is that the doctrine of res judicata is applicable only when the cause of action in the second suit is identical to the cause of action in the first. . . . He [the employee] could only

15. Wright, Miller & Cooper state essentially the same rules:
"It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding, and even clearer that no penalty should be inflicted if a deliberate effort to combine such matters has been expressly rejected." *Id.* § 4412 at 93.
"Matters that can be advanced only before an administrative agency ordinarily do not form part of a single claim with matters that can be advanced only before another agency or a court." *Id.* at 94 (footnote omitted).
"Limits on the competence of a particular agency, moreover, may lead to the conclusion that it lacked authority or occasion even to address the legal issues tendered in a subsequent judicial action. If an agency nonetheless presumes to decide an issue beyond its jurisdiction, courts are likely to apply vigorously the general principle that preclusion is defeated when strong policies underlie the lines that limit the authority of the tribunal that made a prior decision." *Id.* § 4475 at 767-68 (footnotes omitted).

> have brought the unfair labor practice charges before the NLRB. Since he was unable to bring the contract claim based on state law in that forum, he did not 'split his cause of action' by bringing it in state court." 512 F.2d at 131.

Accordingly, it is clear that the ALJ's award was neither claim preclusive nor issue preclusive of Jackson's state court suit, and that it could not suffice to invoke the relitigation exception to section 2283. There being no other even arguable basis for that exception, we hold it was unavailable.

"[A]s expressly authorized by Act of Congress"

We turn now to the "as expressly authorized by Act of Congress" exception to section 2283, the only other exception stated in section 2283 and relied on either by TEIA or the district court (*see* note 6 *supra*). The only "Act of Congress" asserted to "expressly authorize[ ]" the injunction in question is section 21(d) of the LHWCA, 33 U.S.C. § 921(d), which provides as follows:

> "If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to

> enjoin upon such person and his officers and agents compliance with the order."

[9, 10] In this connection, TEIA relies on *Mitchum v. Foster,* 407 U.S. 225, 92 S. Ct. 2151, 32 L.Ed.2d 705 (1972), which held that 42 U.S.C. § 1983 was within this exception to section 2283 despite the fact that section 1983 neither expressly refers to section 2283 nor expressly authorizes injunctions of state court proceedings. *Id.* at 2159. However, *Mitchum* placed heavy reliance on the fact that it was "clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action . . . whether that action was executive, legislative or *judicial.' Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (emphasis supplied)." There is simply no comparable legislative history respecting the LHWCA. Moreover, *Mitchum* plainly requires, in order for the expressly authorized exception to be invoked, that

> "an Act of Congress must have created a *specific* and uniquely federal *right* or remedy, *enforceable in a federal court of equity, that could be frustrated* if the federal court were not empowered to enjoin a state court proceeding." *Id.* 92 S. Ct. at 2159 (emphasis added).

This passage unambiguously requires that what must be subject to frustration, absent exception to section 2283, is a specific, uniquely federal right enforceable in a federal court of equity. The only such federal right enforceable in a federal court of equity that section 921(d) creates is a right on behalf of the covered employee (or administrative official on his behalf) to enforce against an em-

ployer or insurer payment of an award made under the LHWCA. Obviously, that right could not possibly be frustrated if the federal court were unable to enjoin state proceedings brought by the worker against the insurance carrier for tort damages allegedly due the worker under state law. Simply stated, section 921(d) does not confer rights—let alone a specific and uniquely federal right enforceable in a federal court of equity—on the LHWCA employer or its insurance carrier.

[11] Of course, the fact that the statute authorizes an injunction by one party for one purpose, and hence in in such a case may come within the expressly authorized exception to section 2283, does not mean that the bar of section 2283 is inapplicable where an injunction is sought by a different party and for a different purpose. That, indeed, is the clear holding in *Amalgamated Clothing Workers,* where the Court refused to find that the "expressly authorized" exception applied to an injunction sought by a union against state court injunctive proceedings brought against it by the employer, despite the fact that the relevant statute did authorize analogous federal injunctive relief at the request of the National Labor Relations Board. 75 S. Ct. at 455-56.[16] Moreover, a contrary conclusion would clearly be inconsistent with the result in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S. Ct. 2881, 53 L.Ed.2d 1009 (1977). To say that the LHWCA provision entitling workers to secure injunctions against employers or insurers for one purpose authorizes the latter to procure injunctions against the

16. *Amalgamated Clothing Workers* specifically distinguished the earlier decision in *Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501, 74 S. Ct. 699, 98 L.Ed. 887 (1954), on that basis. 75 S. Ct. at 456.

former for a wholly different purpose is simply to stand the LHWCA on its head. It also wholly disregards the words "as expressly" in section 2283 and the admonitions of the Supreme Court that section 2283's prohibition "is not to be whittled away by judicial improvisation," *Amalgamated Clothing Workers*, 75 S. Ct. at 454, and that its exceptions "are narrow and 'are not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 108 S. Ct. at 1689.

The district court also made passing reference in this connection to section 5(a) of the LHWCA, 33 U.S.C. § 905(a), the exclusivity of the statute.[17] However, nothing in section 5(a) purports to grant anyone a right or remedy "enforceable in a federal court of equity." Section 5(a) may indeed provide a basis for TEIA's claims that Jackson's state law claims are preempted by the LHWCA, but, as we have observed, that does not suffice to avoid the bar of section 2283. *See, e.g., Chick Kam Choo*, 108 S. Ct. at 1691.

Accordingly, we hold that the "as expressly authorized by Act of Congress" exception to section 2283 is inapplicable.

Injunctive relief not available

[12] Section 2283 generally bars injunctions against the prosecution of pending state court proceedings. The only exceptions are those stated in section 2283 itself, and none of those are applicable here. That being the

17. Section 905(a) provides in pertinent part:
"The liability of an employer prescribed in section 904 of this title [liability for compensation benefits and medical expenses] shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury. . . ."

case, federal preemption or interference with a federally protected right, even when such is unmistakably clear, does not suffice to avoid the bar of section 2283. Section 2283 hence deprived the district court of authority to issue the injunction.

Declaratory Judgment

We next turn to the remaining question presented, namely, whether the district court, though barred by section 2283 from granting TEIA an injunction against Jackson's further prosecution of his state suit, could nevertheless grant TEIA's request for declaratory judgment that Jackson's state suit claims were all invalid because preempted by the LHWCA or precluded by the ALJ award.

[13] One of the main purposes of the Federal Declaratory Judgment Act (note 2, *supra*) was to provide a means to grant litigants judicial relief from legal uncertainty in situations that had not developed sufficiently to authorize traditional coercive relief. Litigants would no longer be put to the Hobson's choice of foregoing their rights or acting at there peril; nor, if they had already acted, would they be forced to wait, for perhaps many years, until the statute of limitations expired, to know whether they had been subjected to some significant liability. *See, e.g., Perez v. Ledesma,* 401 U.S. 82, 91 S. Ct. 674, 690-92, 27 L.Ed.2d 701 (1971) (opinion of Justice Brennan, joined by Justices White and Marshall, concurring in part and dissenting in part). In the words of Professor Borchard, in his written statement submitted at the hearings on the Federal Declaratory Judgment Act, with the enactment of that statute the courts would no longer have to tell "the prospective victim that the only

way to determine whether the suspect is a mushroom or a toadstool, is to eat it."[18]

TEIA's instant suit is wholly outside the foregoing parameters. As previously noted, it was filed almost a year after Jackson's state suit was filed, and many months after the ALJ's award had become final and had been paid in full. The state court had overruled TEIA's plea in bar, and the state case was moving along to trial. TEIA's conduct complained of in the state suit had long since been concluded, and years had passed since Jackson had engaged in any LHWCA-covered employment. There was no putative mushroom that TEIA wished to eat, but only after first receiving judicial advice. Nor was TEIA in the position of not knowing when its potential liability would ever be judicially determined, for the state case was moving to resolution. There was no dispute between TEIA and Jackson other than Jackson's state

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18. Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75-78 (1928), as quoted in *Perez*, 91 S. Ct. at 692. In *Perez*, Justice Brennan also quotes from the Senate Report (S. Rep. No. 1005, 73d Cong., 2d Sess. (1934)) on the Federal Declaratory Judgment Act the following, among other passages:

> " 'The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity.' " *Perez*, 91 S. Ct. at 690-91.

By contrast, it has long been recognized that " '[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing . . . to choose a forum.' " *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 168 (5th Cir. 1986) (quoting *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951), *cert. denied*, 342 U.S. 905, 72 S. Ct. 294, 96 L.Ed. 677 (1952), quoting *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939)).

suit. TEIA's federal action was not to resolve a controversy that existed independently of Jackson's state suit; nor was it to decide some other controversy, with merely incidental effect on the state suit. It is plain that the *only* purpose and effect of TEIA's federal suit was to defeat Jackson's state suit against it and to, in effect, overrule the state trial court's denial of TEIA's plea in bar.

To allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic minor technicality, easily avoided by mere nomenclature or procedural slight of hand. A federal declaratory judgment will, of course, be *res judicata* of the state suit, thus resolving it as surely as an injunction, and in any event the declaratory judgment can itself be enforced by injunction under 28 U.S.C. § 2202 pursuant to the "protect or effectuate" exception to section 2283. As the Court observed in *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764, 767-68, 27 L.Ed.2d 688 (1971):

> "[Ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declara-

> tory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would."

[14] Accordingly, we follow the weight of authority in holding that "[i]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." Wright, *Federal Courts* § 47 at 285 (4th Ed. 1983).[19] *See also, e.g., Ahrensfeld v. Stephens,* 528 F.2d 193, 197 n. 6 (7th Cir. 1975) ("Nearly all of the cases in this area involve declaratory as well as injunctive relief. Declaratory relief has been generally regarded as to be as objectionable in this context as injunctive relief."); *Thiokol Chemical Corp. v. Burlington Industries, Inc.,* 448 F.2d 1328, 1332 (3d Cir. 1971), *cert. denied,* 404 U.S. 1019, 92 S. Ct. 684, 30 L.Ed.2d 668 (1972);[20] *Chandler v. O'Bryan,* 445 F.2d 1045, 1058 (10th Cir. 1971), *cert. denied,* 405 U.S. 964, 92 S. Ct. 1176, 31 L.Ed.2d 241 (1972) ("[W]here an injunction is improper under § 2283, declaratory relief should not be given. *Samuels v. Mackell* . . ."); *Garrett v. Hoffman,* 441 F.

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19. To the same effect is Wright, Miller & Cooper, *supra,* § 4222 at 503-04 ("Thus if a declaratory judgment would have essentially the same effect as an injunction, it should be refused if the injunction would be barred by § 2283." (Footnote omitted.)).

20. *Thiokol* states (448 F.2d at 1332): "Normally, the policy that precludes federal injunctions against state actions is also applied to prohibit declaratory judgments. . . . True, the statute [section 2283] explicitly prohibits only injunctions. Its analogical extension to prohibit declaratory judgments is justified in situations where the underlying policy against unseemly interference with proper state litigation applies to both," and accordingly, the federal declaratory judgment suit "should not proceed unless and until it shall appear to and be found by the district court that the state court is willing to hold the matter before it in abeyance pending a declaratory federal adjudication."

Supp. 1151, 1155-56 (E.D. Pa. 1977). In *H.J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir. 1951), *cert. denied*, 342 U.S. 905, 72 S. Ct. 294, 96 L.Ed. 677 (1952), the Ninth Circuit affirmed the dismissal of a federal suit for injunctive and declaratory relief aimed at a pending state proceeding. The Court noted that section 2283 barred injunctive relief and, respecting declaratory relief, remarked on "the perversion of the purpose of declaratory judgment legislation which occurs when it is used to anticipate the result of litigation pending in another forum," *id.* 189 F.2d at 508, and went on to state:

> "The strong and consistently recognized national policy to avoid such needless conflict or friction between state and federal courts underlies and finds legislative expression in Section 2283. . . . [T]his statute and the policy underlying it afford sound basis for a judicial conclusion that the granting of such declaratory relief would constitute an abuse of discretion." *Id.* at 509.

Heinz was cited with approval in this respect in *Samuels v. Mackell*, 91 S. Ct. at 768. Likewise, in *T. Smith*, we quoted with approval the concluding portion of the above-set out language, beginning with "this statute." 275 F.2d at 406.

Finally, any remaining doubt on this score was surely laid to rest by the decision in *California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982), where the Court held that the Tax Injunction Act, 28 U.S.C. § 1341,[21] precluded declara-

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21. Section 1341 provides:
"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

tory judgment that a state tax law was unconstitutional. The Court observed:

> "Although this Court once reserved the question, we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *Grace Brethren Church,* 102 S. Ct. at 2507 (footnote omitted).

The *Grace Brethren Church* opinion goes on to explain:

> "[B]ecause there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another. . . ." *Id.* at 2508.

The same reasoning is fully applicable to section 2283.

For its holding that section 2283 though barring an injunction nevertheless did not prohibit declaratory relief, the panel majority, 820 F.2d at 1420, relied primarily on *Steffel v. Thompson,* 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974), particularly its language that injunctions were "strong medicine" while declaratory relief was "less intrusive." *Id.* at 1219, 1221. We disagree, and on the contrary read *Steffel* as wholly consistent with the view that declaratory relief is inappropriate where section 2283 bars an injunction. The crucial fact in *Steffel* was that there was no pending state court proceeding. Section 2283, however, "has no application until the [state] proceedings have begun. An injunction can issue from a federal court restraining a party from instituting state proceedings." Wright, Miller & Cooper, *supra,* § 4222 at 506-07. Thus *Steffel* did not present a situation

where declaratory relief could be used to achieve a result forbidden by section 2283. In *Steffel,* the party seeking declaratory relief desired to engage in handbilling at a shopping center, but had been warned that if he did so he would be arrested and charged with violating a state criminal statute. He then, without ever having been arrested or charged, sought in the federal court a declaratory judgment that the state statute was unconstitutional. 94 S. Ct. at 1214.[22] That no state proceeding was pending was not merely incidental to *Steffel,* but was rather critical to both its reasoning and result.

Steffel commences by stating that "[t]his case presents the important question . . . whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending." *Id.* at 1213. It observes that "the Court's recognition that the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'" *Id.* at 1217. In a significant passage, it then sets out four reasons why declaratory relief in these circumstances is not inappropriate:

> "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention [1] does not result in duplicative legal pro-

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22. It is to be noted that *Steffel* presented the classic case for declaratory relief, where the plaintiff is put to the Hobson's choice of giving up an intended course of conduct which he believes he is entitled to undertake or facing possible severe civil or criminal consequences if he does undertake it. *Steffel* in this connection reiterates Professor Borchard's comments, in urging enactment of the Federal Declaratory Act, about the mushroom-toadstool dilemma, *id.* at 1220 n. 18, and otherwise reviews the legislative history of that statute to show it was intended to afford relief in such circumstances. *Id.* at 1219-22. Those considerations are wholly inapplicable to the present case, and likewise to most or all others covered by section 2283, which presupposes a pending state proceeding.

> ceedings or [2] disruption of the state criminal justice system; [3] nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, [4] while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity. . . ." *Id.* at 1217 (bracketed numbers supplied).

It is to be noted that *none* of these considerations favoring declaratory relief is applicable here, nor would any of them be applicable in almost any case in which section 2283 prevented injunctive relief as each depends on the absence of a pending state suit.

Thus, Steffel's mention of the "less intrusive" nature of declaratory relief must be understood as referring to instances where there is no pending state proceeding. This is made plain by the following passage from the opinion:

> "*When* no state proceeding is pending *and thus* considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief." *Id.* at 1217 (emphasis added).

Moreover, *Steffel's* heavy reliance, *id.* at 1219-22, on Justice Brennan's separate opinion in *Perez* is highly

relevant. In his *Perez* opinion, Justice Brennan clearly stated:

> "[W]here a state proceeding exists that was pending at the time suit was filed in federal court the federal court should ordinarily decline to render either declaratory or injunctive relief." 91 S. Ct. at 693 (footnote omitted).[23]

Surely Justice Brennan, in his *Steffel* opinion, had no intention of departing from what he had written in *Perez*. At all events, the Court's most recent opinion on this subject in *Grace Brethren Church* clearly points to the result we reach here.

We conclude that section 2283 and the policies which underlie it prohibit declaratory as well as injunctive relief here. This prevents the emasculation of section 2283 and accomodates the concerns of comity and federalism which underlie it, while at the same time preserving the core functions and purposes of the Declaratory Judgment Act.

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23. Other portions of Justice Brennan's *Perez* opinion are in accord, *viz*:

> "[T]he most significant factor determining the propriety of federal intervention is whether a state proceeding exists that was initiated *before* the federal suit was filed.
>
> ". . . .
>
> ". . . The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy. . . . Moreover, federal intervention may disrupt the state proceeding. . . . Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process. For these reasons, federal courts should not ordinarily intervene by way of either declaratory or injunctive relief. . . ." *Id.* at 692, 695 (emphasis in original).

Accordingly, the district court should not have entertained TEIA's request for declaratory judgment.[24]

Conclusion

We do not pass on the merits of TEIA's preemption claim. Assuming, as we do, that the claim has merit, we nevertheless hold that pursuant to section 2283 and the principles underlying it the district court should not have entertained TEIA's request for either injunctive or declaratory relief. As that is all the relief sought by TEIA, its suit must be dismissed. The dismissal is, of course, without prejudice to TEIA's assertion that the claims advanced against it by Jackson in his state suit are preempted by the LHWCA. That matter we leave to resolution, as between Jackson and TEIA, by the state trial court, subject to review by the state appellate courts and ultimately by the United States Supreme Court.

Accordingly, the judgment of the district court is REVERSED and the cause is ordered DISMISSED.

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24. The dissent asserts that declaratory (though not injunctive) relief was proper because the state suit was removable since the LHWCA completely displaced and preempted all Jackson's claims therein under the theory of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987). As stated in note 8, *supra*, we do not resolve whether or not the attempted analogy to *Metropolitan Life* is apt. Of course, if the state court suit were never potentially removable. the removal argument is necessarily unavailing to sustain declaratory relief. Assuming, *arguendo* only, that Jackson's state court suit was potentially removable, there has never been even any attempt to remove it, and the right of removal is clearly one which may be waived. We decline to authorize an "end run" around removal procedures and jurisprudence by authorizing a party to ignore removal (and its limitations) but nevertheless achieve the same result by filing a federal court declaratory judgment suit with the sole object of litigating a preemptive defense to the federal defendant's earlier filed, pending state court suit against the federal plaintiff.

CLARK, Chief Judge, concurring specially in the opinions of Circuit Judges GARWOOD and ALVIN B. RUBIN:

In this case that has produced three other opinions, I add a fourth, not to say I disagree with any of them but to emphasize the one critical matter that none of us disputes: *The state cause of action is preempted by LHWCA*. If I could read *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987), to permit declaratory relief, I would join Judge Brown. His reasoning would assure the only just, common-sense end to this law suit. While the majority opinion is full of proper legal sound and fury, it can signify nothing but trouble or injustice.

I wish I didn't feel bound to agree that precedent compels this court to send the case to a court that, if it acts correctly, may only dismiss. If the State court should act improperly to entertain this litigation and grant the relief sought by plaintiff, the only hope (and that hope is a forlorn one as Judge Rubin points out) for correction the Association will have will be the chance it can secure discretionary review in an overburdened Supreme Court. I am at a loss to comprehend how this procedure can advance comity. Exalting the form of the anti-injunction act over the substance of preemption strips both comity and justice of their meaning.

ALVIN B. RUBIN, Circuit Judge, with whom JOHNSON, Circuit Judge, joins concurring (Circuit Judges BROWN and WILLIAMS join in part II):

I.

The court's opinion follows settled doctrine and I therefore join in it.

II.

It is time, however, for Congress to reconsider the statute that we are obliged to follow, for it is no longer adequate to assure the protection of federal rights.

There can be little doubt that the LHWCA preempts state jurisdiction over suits involving failure to pay compensation under the Act.[1] Yet we rely on state courts to enforce the employer's federal right not to have this claim litigated in state court, stating that, if state courts do not protect that right, the employer may seek relief from the United States Supreme Court. While the state courts once had exclusive original jurisdiction over claims arising under federal law, federal-question jurisdiction is now vested in the federal district courts with appeal to the circuit courts of appeal. State trial and appellate courts are therefore no longer as familiar with these questions as they were a century ago. The state court judgments in such cases are subject to final review by the Supreme Court, but this remedy is no longer available by appeal, for as a result of recent legislation virtually eliminating the Court's mandatory appellate juris-

1. See Majority Opinion, Footnote 7.

diction,[2] litigants must seek relief by application to the Court for a writ. Such writs are only sparingly granted. In the 1987-88 term, which was typical, the Court granted only 267 writs, including the miscellaneous docket, and published only 259 opinions, including per curiams and memoranda. Given the other demands on the Court's time, including the presentation to it each year of more than 4400 applications for writs, the number of cases in which state courts decide federal-preemption questions, and the even larger number in which federal courts abstain from deciding federal issues, again leaving final, now discretionary, review to the Supreme Court,[3] the volume of litigation presented to the Court is now so large that the Court simply cannot adequately assure the protection of federal rights in those cases. Thus both in cases governed by the Anti-Injunction Act and in those controlled by rules requiring federal court abstention, the promised ultimate review by the Supreme Court is apt to be illusory. The remedy, of course, lies with Congress, or, in abstention cases, in reconsideration of the doctrinal rules by the Supreme Court.

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2. Act of June 27, 1988, Pub. L. 100-352, §§ 3, 7, 102 Stat. 662, 664 (to be codified at 28 U.S.C. § 1257); *see* H.R. Rep. 660, 100th Cong., 2d sess. (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 766-83.

3. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 850 F.2d 1069 (5th Cir. 1988).

JOHN R. BROWN, Circuit Judge, with whom JERRE S. WILLIAMS, Circuit Judge, joins dissenting in part and concurring in part:

I.

I concur in that portion of the Court's[1] opinion which in effect holds that LHWCA preempts Jackson's assorted Texas-based claims for tortious, bad faith, delay in payment and failure to pay and provide longshore benefits. Although it mildly disclaims[2] any such purpose, the disclaimer, under the accepted principles of the Fifth Circuit is ineffectual.

This Court, through Judge Garwood speaking for the panel (Judges Gee and Jones) in all of its majesty has indeed—as TEIA has long asserted—determined that any such state based claim is preempted by the LHWCA. *Atkinson v. Gates, McDonald & Company*, 838 F.2d 808, *reh'g en banc denied*, 844 F.2d 788 (5th Cir. 1988). The only remaining question is whether this decision effectually reflects the view of this Court en banc.

---

1. As it is the court, and not just a majority, I use this terminology throughout to refer to Judge Garwood's powerful opinion for the Court sitting en banc.

2. *See* the Court's n. 7: "[A]nother panel of this Court . . . held that a state law cause of action for a bad faith failure to pay LHWCA compensation when due was preempted by the LHWCA. *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, *rehg. en banc denied*, 844 F.2d 788 (5th Cir. 1988). Our holding concerning the Anti-Injunction Act and the Declaratory Judgment Act implies no disagreement with *Atkinson*, which remains the law of this Circuit unless overruled by a subsequent contrary pronouncement of the Supreme Court or of this Court en banc." *Texas Employer's Ins. Ass'n v. Jackson*, 820 F.2d 1406, 1412 n. 7 (en banc).

Under the long accepted and oft repeated[3] standards, *Atkinson* is binding on all panels of this court—which means all of the Judges thereof—until overruled by the court en banc. The en banc court does have the power to reject it, but until rejected by the court en banc it is the law of this circuit.

Here the court, citing *Atkinson* with full approval and no criticism or disapproval, has failed to reject or disapprove its holding. The decision is therefore binding on the Court of Appeals for the Fifth Circuit and each and all of the Judges comprising either the en banc court, the majority of the en banc court, or the panel.

Moreover on the intrinsic merits of preemption, *Atkinson* applies the same triple analysis used in the panel opinion[4] of (i) Congressional intention to preempt,[5] (ii) comprehensiveness of the federal scheme[6] and (iii) the state law conflicts with federal law[7] to declare the state case to be preempted.

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3. *Alexander v. Chevron, U.S.A.*, 806 F.2d 526, 527 (5th Cir. 1986) (citing *United States v. Albert*, 675 F.2d 712, 713 (5th Cir. 1982)); *Keith v. St. George Packing Co.*, 806 F.2d 525, 526 (5th Cir. 1986); *Ketchum v. Gulf Oil Corp.*, 798 F.2d 159, 162 (5th Cir. 1986); *Victorian v. Miller*, 796 F.2d 94, 96 (5th Cir. 1986); *Wilson v. Taylor*, 658 F.2d 1021, 1034 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346, 1354 n. 10 (5th Cir. 1981); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-93 (5th Cir. 1981) (citing *Ford v. United States*, 618 F.2d 357, 361 (5th Cir. 1980); *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976) and *Robinson v. Parsons*, 560 F.2d 720, 721 n. 2 (5th Cir. 1977)); *Fulford v. Klein*, 529 F.2d 377, 379 (5th Cir. 1976).

4. This refers to the panel (Judges Brown, Reavley and Jones) opinion, *Texas Employer's Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987). Judge Jones dissented in part in the panel opinion.

5. Panel Op., 820 F.2d 1406 at 1411.

6. *Id.* at 1411-12.

7. *Id.* at 1412.

II.

Without a doubt preemption of LHWCA is and always has been the critical issue in this case. It is the burning question now committed by the court to the state courts of Texas. In a day and time where the demands are beyond the capacity of the judiciary readily to handle the exponential increase in the volume of litigation, there is a need for an authoritative pronouncement of federal law by a federal court having jurisdiction over the subject and the parties.

That need, that demand is in no sense a theoretical, academic problem. Indeed a pronouncement of that federal constitutional law has immediate, great practical utility. Although this pronouncement has no coercive effect of its own, there is no doubt that the Texas courts will, as always, accord full weight to the determination of this federal court having jurisdiction over the parties, speaking in terms of the application of a federal statute with the constitutional imprimatur of the Supremacy Clause.

III.

I dissent as to the court's holding that, as in the case of an injunction, the Anti-Injunction Act prohibits in this case the issuance of a declaratory order.

I start with the proposition that despite the well-pleaded complaint rule sired by *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908), the case of *Jackson v. Texas Employers' Ins. Ass'n* filed in the District Court of Jefferson County, Texas, was one within the jurisdiction of the United States District Court. To be sure, the negative characteri-

zation of the well-pleaded complaint rule provides that the presence of a contention of federal preemption as a defense to the state-based claim, does not make the case within the jurisdiction of the federal court. But this negative characterization is dispelled by a proper consideration of Supreme Court precedents. In *Avco Corp. v. Machinists*, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968),[8] the plaintiff employee filed suit in state court alleging that the defendant union had breached its "contract" by sanctioning work stoppages. The employee sought temporary and permanent injunctions. Clearly, the plaintiff had a federal cause of action under § 301 of the LMRA, if he desired it. The union then sought to remove the case to federal court, over the employee's objections.

The court of appeals held, and the Supreme Court affirmed, that the employee's action "arose under" § 301, and thus the union's motion to remove the case to federal court was proper. (The removal statute,[9] is procedural and derivative only. An independent basis of jurisdiction must be established in either removal or declaratory judgment actions.) The necessary ground of decision in *Avco* was that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action,

8. The majority, save for reference to Judge Jones' dissent in the panel opinion, avoids resolving "this difficult issue."

9. *See* 28 U.S.C. § 1441(b).

any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board*, 463 U.S. at 23-24, 103 S. Ct. at 2853, 77 L.Ed.2d at 440.

This continues to be controlling law. In a very recent decision, the Supreme Court has continued the trend begun nearly 20 years ago in *Avco*. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987),[10] the Court affirmed the vitality of *Avco* and extended the Avco-LMRA exception to analogous ERISA cases. After setting out the general nature of the well-pleaded complaint rule, the Court states

> One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-exempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years [since *Avco*], this Court has singled out claims preempted by § 301 of the Labor Relations Management Act for such special treatment.
>
> . . . .
>
> The question thus resolves itself into whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by § 502(a)(1)(B) [the section conferring private causes of action under ERISA] as an action arising under federal law.

481 U.S. ____, 107 S. Ct. at 1546-47, 95 L.Ed.2d at 63.

To answer that question, the Court, with little difficulty, found that Congress has conferred federal jurisdiction in

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10. The majority, save for reference to Judge Jones' dissent in the panel opinion, avoids resolving "this difficult issue."

cases with such overarching federal, legislatively declared interests. Accordingly, the Court concluded that *Taylor*, although "purport[ing] to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* at ____, 107 S. Ct. at 1548, 95 L.Ed.2d at 65.[11]

Our question, then, is whether the LHWCA is powerful enough to satisfy the principle of *Avco* and *Taylor*: stated differently, is the LHWCA entitled to the same federal protection as are the LMRA and ERISA. It is a question easily answered in the affirmative. The Court focuses on the "explicit direction" from Congress—both in statute and legislative history—that demonstrates its intent utterly to "displace" state law in establishing federal question jurisdiction. As set forth in some detail in the panel opinion, the LHWCA, springing originally from the impeccably federal province of admiralty jurisdiction, has continued, unquestioned through fifty years of Congressional monitoring, to remain squarely under the protection of federal jurisdiction. A review of the LHWCA and its legislative history yields at least as strong "explicit direction."

Our determination that the LHWCA is so preemptive as to create federal question jurisdiction is no "expansion"

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11. Only a few illustrations are necessary to reveal how pervasive is the LHWCA and how destructive an interference are Jackson's state asserted claims. For example, in Paragraph VII of Jackson's state court complaint, Jackson purports to invoke Article 21.21 of the Texas Insurance Code in pleading that "three times the amount of actual damages be awarded as a matter of law." Yet § 905 of the LHWCA provides that the liability prescribed under the Act "shall be exclusive and in place of all other liability. . . .

Jackson also abrogates the Congressionally established scheme of LHWCA economic rights and limitations in Paragraph XIV of his complaint. There, he invokes the Texas Deceptive Trade Practices Act seeking "as a matter of law [that] damages be trebled."

of the *Avco* rule. The LHWCA, if anything, is broader, and more comprehensive than the LMRA. The LMRA merely places jurisdiction of labor disputes in the federal district courts. The LHWCA, on the other hand, contains not only the exclusive remedy section (§ 905(a)), but also sets out sections and chapters that comprehensively regulate employers and insurance carriers that provide LHWCA coverage, and utterly control the sum total of rights and obligations of insurers, employers and employees. This, by no means, then, dilutes the *Avco* rule; it acknowledges an exception more powerful than the original. *See also Taylor,* 481 U.S. ____, ____, 107 S. Ct. at 1548, 95 L.Ed.2d at 65 (Brennan, J., concurring).

There is no doubt that Jackson's state suit was bottomed on the LHWCA.[12] Without it, no payments were

12. *See* the Court's opinion slip op. 1153 at 1157-1158, ____ F.2d____ at _____ [manuscript pp. 7-8].

This is factually highlighted by the following excerpts from Jackson's state complaint:

> It was Texas Employers' Insurance Association's duty under the Longshoreman & Harbor Worker's Compensation Act to pay Leroy Jackson disability benefits.
>
> . . . .
>
> This suit is also filed as a result of Defendant's tortious breach of their common-law duty to act with care, skill, reasonable expedience and faithfulness in the performance of their duties under the Longshoreman & Harbor Worker's Compensation Act.
>
> . . . The Longshoreman & Harbor Worker's Compensation Act imposes a duty upon Defendant to perform with care, skill, reasonable expedience and faithfulness its duties as set forth under the Act.
>
> . . . .
>
> . . . They misrepresented material facts to a variety of people, these misrepresentations were relied on and they were relied on to the detriment of Leroy Jackson. These misrepresentations were intentional and designed to defraud Leroy Jackson of his rights under the Longshoreman & Harbor Worker's Compensation Act and his compensation benefits. . . .

due by TEIA, no medical benefits had to be furnished by TEIA. Without the LHWCA there was no basis whatever for any relief. His claim became even more specific in terms of LHWCA by his assertion that (i) he was entitled to prompt payment of compensation benefits and (ii) the exercise by TEIA of its statutory right to file a controversion was in bad faith under and in violation of Texas standards.

The result is that TEIA could have removed this case to the same federal District Court that granted the aborted injunction and declaratory judgment. In no way do I suggest that its failure to be removed now affords it a right to ignore the Anti-Injunction Act. But now things are quite different. No longer is it just a case which can properly be filed and tried in the state court. Now it is a case which was initially one properly triable in the Federal District Court. For that same Federal Court to grant a declaratory order that the state case is preempted by LHWCA is not an unseemly intrusion into an independent tribunal. The absence of intrusion distinguishes the situation in which declaratory relief is held unavailable on the analogy of the Anti-Injunction Act because of like intrusive effect.

I therefore dissent.

Defendant, its agents, servants and/or employees have committed the tort of intentional infliction of emotional distress. . . . These acts and steps were specifically aimed at defrauding Leroy Jackson of his rights under the Longshoreman & Harbor Worker's Compensation Act . . . .

Defendant, its agents, servants and/or employees, negligently inflicted emotional distress on Leroy Jackson. . . . They negligently took these steps in an effort to deny Leroy Jackson compensation benefits rightfully due to him under the Longshoreman & Harbor Worker's Compensation Act.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4450

INCOME SECURITY CORP., ET AL.,
Plaintiffs-Appellees,

versus

LOUISIANA OILFIELD CONTRACTORS ASSOC., ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Lousiaina

Before GEE, SMITH, and DUHE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

March 22, 1989

ISSUED AS MANDATE: MAY 8, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4450

INCOME SECURITY CORPORATION, ET AL.,
Plaintiffs-Appellees,

versus

LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion March 22, 5 Cir., 1989 ____ F.2d ____)
(April 27, 1989)

Before GEE, SMITH and DUHE, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

END

Supreme Court, U.S.
FILED
JUL 13 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 88-2117 (2)

IN THE
Supreme Court of the United States

October Term, 1988

INCOME SECURITY CORPORATION, INC.,
and GARY FELTON,

Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS
ASSOCIATION, INC., *et al.*,

Respondents.

MEMORANDUM OPPOSITION TO CERTIORARI

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4 pp

No. 88-2117

October Term, 1988

INCOME SECURITY CORPORATION, INC., and GARY FELTON,

Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., *et al.*,

Respondents.

MEMORANDUM OPPOSITION TO CERTIORARI

Respondents, LOCA (Louisiana Oilfield Contractors Association, Inc., its ERISA plan, and its plan's trustees, in their representative and individual capacities), represent to this Court:

1.

The Federal Circuit Court overturned an injunction of the Federal District Court against the prosecution of Respondents' state suit. The District Court had ruled Respondents' state suit to be an ERISA case beyond the jurisdiction of the State Court, exclusively within the jurisdiction of the Federal, and enjoined it on that basis.

2.

If this Court lets the Circuit Court's judgment stand, there will be no disposition of the ultimate merits of the jurisdictional question nor of the cause. The case will simply go back to State Court.

3.

After return to State Court, two adverse things may happen to Respondent:

(1) After a full and orderly merit hearing of the jurisdictional facts, there may be dismissal for lack of jurisdiction on a conclusion that our state suit is an ERISA case of exclusive jurisdiction of the Federal Court; or,

(2) Respondents may simply lose on the merits of the state cause itself; the jury may rule that Respondents did not prove a case under state law anyhow.

4.

Since the ruling of the Circuit Court is not dispositive, this is not a case worthy of certiorari for that reason alone, if no other. Compare, *Schexnider v. McDermott International*, 817 F.2d 1159 (5th Cir., 1987), cert. d. _____ U. S. _____ , 108 S.Ct. 488 (1987), lost by the complaining petitioner on the underlying merits, 860 F.2d 1717 (5th Cir., 1989), where trial of the cause resulted in findings that plaintiff had no case under either Australian or American law, mooting the need for review by this Court, previously sought by the petitioner and denied by this Court, about which law was applicable, American or Australian.

5.

If Respondent, LOCA, likewise fails to make out a case under state law in state court, the jurisdictional point raised by Petitioner here is similarly washed out completely, ERISA or no ERISA pre-emption or jurisdiction. The merit trial will moot the point.

6.

There is no attack upon the corpus of a trust or plan here, ERISA or otherwise. Respondents are simply suing Petitioners for damages.

7.

This memorandum opposition will be followed by the standard opposition plus a petition or cross petition, or both, if necessary; but Respondents submit that under the present posture of this case there is no reason for certiorari at all, regardless of the merits of the arguments of the parties concerning the vacation of the injunction.

8.

"Pertinent considerations of judicial policy here come into play. The case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." Opinion of Mr. Justice Frankfurter, respecting denial of certiorari, in *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).

Thus, we respectfully submit that review should be denied.

Respectfully submitted,

William Rutledge per a

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(3)

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1988

INCOME SECURITY CORPORATION, INC.,
and GARY FELTON,

Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS
ASSOCIATION, INC., *et al.*,

Respondents.

ALL RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Is the petition premature?

2. Are there any exceptions to the Anti-Injunction Act that would allow the injunction against the state case and allow the declaratory judgment that the suit there was an ERISA case of exclusive federal jurisdiction?

3. Were there any grounds for implying an exception, based on the *Mitchum* rationale?

4. Does the ERISA provision for injunction create an exception to the Anti-Injunction Act?

5. Are there equitable grounds for an exception to the Anti-Injunction Act?

6. Was this an ERISA case?

7. Was it proven to be?

8. Was it time barred?

9. Was there tolling either equitably or legally?

10. Is ERISA Constitutional in its application here?

11. Is LOCA entitled to a jury trial?

LIST OF PARTIES

The parties to the proceedings below were:

Income Security Corporation, Inc., Petitioner

Gary W. Felton, Petitioner

Louisiana Oilfield Contractors Association, Inc., Respondent

Louisiana Oilfield Contractors Association, Inc. Employee Benefit Trust, an ERISA Plan, Respondent

* Peter Borne, Respondent

* Malcolm Gordon, Respondent

* Rodney Guidry, Respondent

* George Crain, Jr., Respondent

* Randy K. Haney, Respondent

* Wayne Bullich, Respondent

* Edwin G. Preis, Jr., Respondent

* Ned Clark, Respondent

* Daniel Fruge, Respondent

* Vance Andrus, Respondent

* In his representative capacity as ERISA Trustee or fiduciary under the ERISA Plan; and in his individual capacity.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-2117

INCOME SECURITY CORPORATION, INC., and GARY FELTON,

Petitioners,

v.

LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., *et al*,

Respondents.

ALL RESPONDENT'S OPPOSITION TO THE PETITION FOR CERIORARI

Respondents, Louisiana Oilfield Contractors Association, Inc.; the Louisiana Oilfield Contractors Association ERISA Plan or Trust; and the trustees and fiduciaries thereof, individually and in their trust capacities, thus respectfully oppose the petition for certiorari:

STATUTES ALSO INVOLVED:

29 U.S.C. §1132(d)(1):

> An employee benefit plan may sue or be sued under this subchapter as an entity.

STATEMENT OF THE CASE

Any help we can give will be in a simple statement of facts told chronologically. Petitioners tell a half-told tale backwards. Petitioners will be called "Mr. Felton" (Gary Felton and his solely owned corporation, Income Security Corporation, Inc.) and respondents (Louisiana Oilfield Contractors Association, its ERISA plan and its plan's trustees in their representative and individual capacities), "LOCA."

The Louisiana Oilfield Contractors Association is an industrial trade association for the mutual benefit of its members, who are oilfield-contracting companies, and for their employees. LOCA created an ERISA plan for medical and disability benefits for those employees called the Louisiana Oilfield Contractors Association Employees Benefit Trust. It was an ERISA trust or plan to provide medical and disability benefits to the employees at a cheaper rate than the hospital and disability coverage the members could get individually or commercially. The trustees (ERISA fiduciaries of the plan) are also respondents here in their individual and representative capacities; they are Peter Borne, Malcolm Gordon, Rodney Guidry, George Crain, Jr., Randy K. Haney, Wayne Bullich, Edwin G. Preis, Jr., Ned Clark, Daniel Fruge and Vance Andrus.

These trustees controlled and operated the trust. (The Plan has always been called a "trust" and we continue to do so here.)

Before the trust could be formed and put into operation, the trustees had to have some information: whether the premium rates under this ERISA plan would in fact be cheaper for the employees (if not, nobody wanted the plan); and what permium rate should be charged to give the

employees advantage of lower rates but at the same time keep the trust solvent; and what type of reinsurance or "stop-loss" coverage and disability coverage should be obtained.

Mr. Felton entered the picture at this point, before the trust was formed. He represented himself to be an insurance broker or insurance consultant capable of recommending and obtaining the proper stop-loss coverage and disability coverage; and he undertook to get the proper coverage for the trustees; he represented that he was capable, in an actuarial capacity, of arriving at sound actuarial figures for premium rates that would again give the employees this advantage but also keep the trust solvent; and he undertook to provide that information, again, before the trust was formed.

After the trust had been in operation for some time, the LOCA trustees realized that Mr. Felton had been careless: first, he had not gotten the proper stop-loss coverage nor disability coverage; secondly, his premium rates were so low that the trust was going broke even with the best of experience and with the best of claims handling.

And as a result of Mr. Felton's carelessness as an insurance broker and his negligence as an actuarial consultant, the trust did go broke. For the purposes of the pleaded case, it went broke because of Mr. Felton's commercial malpractice in those fields.

Things got desperate. Hospital patients were being turned back at the hospital doors because there was no money to pay their hospital bills. Cancer patients who came to the hospital to get their malignat tumor removed were sent back home with it still there.

It became a nightmare. So the trustees rushed into the money market to borrow several million dollars on their own personal signatures and own personal security, their homes, their property, to pay these bills.

After the bills were paid, the trustees filed suit in state court for malpractice against Mr. Felton as an actuary and as an insurance broker. They demanded reimbursement or indemnity for the money they had to borrow and pay out and for damages. The ERISA trust had gone broke and had fallen in; nobody wanted to buy anymore hospital coverage from it no matter what. So, the Association and the trust and the trustees, these men who borrowed the money on their individual signatures, all sued Mr. Felton in state court.

Mr. Felton filed in state court a plea to the jurisdiction: that the state court was without jurisdiction. But he never set it for a hearing of any type, neither on the pleadings nor on the factual merits.

After several years, with his plea to the jurisdiction of the state court still pending and without provoking a trial of that plea, he runs off in the middle of the night to federal court and files this federal complaint to enjoin further prosecution of the state suit and to have it declared an ERISA case. This, after years of discovery of all types by a platoon of lawyers traipsing up and down the entire country.

LOCA did refer to ERISA in its state pleadings; but obviously LOCA could not plead itself into nor out of this special exclusive ERISA jurisdiction of the subject matter.

Such jurisdiction would have to be determined and only determined by the actual underlying jurisdictional facts no matter what the pleadings said. Such a trial of the jurisdictional facts has never occurred in either court, state or federal.

The federal injunction against prosecution of the state suit was entered on the pleadings of both cases and fragments of depositions showing no more than the statement of facts here.

This conduct of Mr. Felton's, in not even asking the state judge to rule on Mr. Felton's own plea to the jurisdiction before he ran off to federal court, sounds like something akin to prematurity or failure to exhaust state remedies.

The state judge, Judge Marcus Broussard of the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana, still sits there patiently waiting to rule on Mr. Felton's plea to the jurisdiction. He did not rule against Mr. Felton; he was not given a chance to rule either way.

Mr. Felton never indicated what he thought was wrong with Judge Broussard, whether he thought Judge Broussard was too dumb or too lazy to come up with the right answer to the jurisdictional question. So, Mr. Felton's ploy for federal injunction becomes, as it were, a writ of inquest against Judge Broussard, *de lunatico inquirendo*, as if it were against some bungling lunatic, half-mad, half-witted, too ignorant, too lazy, too sorry, too indifferent to decide this jurisdictional point correctly.

What is wrong with Judge Broussard? Nothing is wrong with Judge Broussard; he is neither corrupt nor biased, nor perverse; he is at least a judge of standard competency, at least average intelligence, average ability, and average diligence. If we were Judge Boussard, we would be thinking, "I wonder why Mr. Felton feels he needs a federal judge to decide this point; what's wrong with me; I'll try to do the best job I can in getting it decided right; if he thought something else, he could have simply brought a motion to recuse; I might not be the brightest judge in the world, but I'd sure have given it a good try."

Mr. Felton's federal maneuver is almost something personal against Judge Broussard, marking him as somehow too inferior to do the job. (Our recollection is that in the *Atlantic Coast Line* case, the proponents of federal injunction at least tried to get the state court to rule in their favor before running off to federal. But Judge Broussard was never afforded this courtesy.)

If Mr. Felton had not liked Judge Broussard's ruling, he had a state appellate chain he could go straight up to this Court just as he has used the federal chain here. All Judge Broussard can think now is "Well, I guess Mr. Felton thought that the federal judges could just do a better job than I would do, with more sense, more energy, more willingness to reach the right conclusion."

Mr. Felton talks of the need for speed to relief; if he really wanted speed he should have stayed where he belonged and pushed the point hard instead of this frolicking federal foray~~; all he~~ is really interested in is more delay any way he can get it to avoid the merits of our claim before a state judge and jury.

At any rate, all the Federal Circuit Court did was to vacate the federal injunction because it violated the Anti-Injunction Act and vacate the declaratory judgment because Judge Broussard could give Mr. Felton all the declaration he needed and also because it was an indirect violation of the Anti-Injunction Act.

LOCA filed many *alternative* defenses, some twenty-one, accompanying this as Appendix A; briefly, that the case was not an ERISA case but simply a malpractice claim under the proprietary sue-clause in ERISA; that the state case had not been barred by ERISA limitation for several reasons, legal and equitable; and that Mr. Felton's claim that the ERISA

statute totally wiped out malpractice cases brought against professional consultants by an ERISA plan without giving any relief, *quid pro quo*, was unconstitutional under the Fifth Amendment and that LOCA was entitled to a jury. (Mr. Felton's ultimate contention was that LOCA's was an ERISA case but that ERISA gave no remedy; so no matter how negligent and guilty of malpractice Mr. Felton was, LOCA had a claim against him that could not be enforced.)

Without an evidential hearing of the jurisdictional facts, the Federal District Court granted the injunction and declared the case one of ERISA jurisdiction. Since the findings and conclusions of that Court have been set forth, we have nothing to say about them but this: We were never given a day in court to show that this was not an ERISA claim; not a chance to call a witness; then the Federal District Court dismissed LOCA's state claim on the basis of the ERISA statute of limitation despite equitable and legal pleas against a time-bar that, again, required a merit hearing. These pleas were supported by LOCA's affidavits.

In Federal District Court, our prime plea was that the point was not *what* but *who*. The point was not what kind of case our state suit was, a proprietary case for malpractice or an ERISA case, but who should decide that point, Judge Broussard, to whom it was first presented, or the Federal District Court, who was to decide it hurriedly upon a plea for preliminary injunction.

On LOCA's appeal, the Circuit Court vacated the injunction and the declaratory judgment and remanded. The Federal District Court has yet to order the state record back to state court, but the mandate of the Circuit Court, all stays denied, is clear in that respect, that it should go back. (LOCA has declined, however, to move for enforcement of its mandate pending Mr. Felton's petition to this Court for certiorari.)

The Circuit Court's reversal cited its very recent *en banc* decision, *Texas Employers Insurance Assn. v. Jackson*, 862 F.2d 491 (5th Cir. 1988), cert. d. 57 U.S.L.W. 3704 (No. 88-1295, April 24, 1989), hereafter referred to merely as "the Jackson decision."

REASONS FOR DENYING THE WRIT

THE PETITION FOR CERTIORARI IS NOT NEEDED NOW

The petition for certiorari is premature. If the merits in state court determine that we have no jurisdiction or that we have not got any case, under any law, this ponderous jurisdictional question that Mr. Felton perceives will simply wash out. This is analogous to maritime cases. If on the merits there is no maritime case proven under American nor Australian law, there is no need for this Court to decide whether the case should have been tried under American or Australian

IN VACATING THE INJUNCTION AGAINST THE STATE COURT SUIT AND THE DECLARATORY JUDGMENT, THE CIRCUIT COURT WAS IN COMPLIANCE WITH THIS COURT'S RULING CASE LAW AND *OBVIOUSLY DID WHAT COMMON SENSE DICTATES.*

Mr. Felton seeks to distinguish the *Jackson* decision, above, page 8; he says that it was just a case under the Longshoremen's Act. To the contrary, this makes the decision more impressive. Petitioner for certiorari in *Jackson* showed a much stronger position; for there petitioner claimed not only the benefit of a federal statue, the Longshoremen's Act, but supposedly the benefit of the federal Constitution itself since the case involved a wet claim, a longshoreman hurt on navigable waters. Yet, federal statute and Constitution

considered, certiorari was denied. The Anti-Injunction Act was obviously applicable. To us, the *Jackson* case is about as strong as a decision can be in upholding the Anti-Injunction Act.

Every statute is presumably important, but if that in itself creates an exception to the Anti-Injunction Act, it becomes illusory, totally viscerated. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977).

Mr. Felton seeks a pincher attack in *Mitchum* and the injunctive provisions of ERISA; but clearly they are irrelevant to the case at hand and show no exception for injunction here.

THE UNIQUE FACTS OF *MITCHUM* MAKE IT INAPPLICABLE

On circumstances virtually unique, *sui generis*, *Mitchum v. Foster*, 407 U.S. 225 (1972), found an implied exception to the Anti-Injunction Act: implied authority under the peculiar circumstances Congress was dealing with. This was narrowly based on the idea that a problem facing Congress, and one that it had specifically in mind, was state "sheriffs who do not see, judges who do not hear." Congress was concerned that state judges would be personally prejudiced when they had cases involving civil rights before them; it was not merely the litigants before them, but also the judges themselves, that Congress saw as "part of the problem."

The petitioner in *Jackson*, above at page 8, also sought to rely on *Mitchum*, but the Circuit Court held: "However, *Mitchum* places heavy reliance on the fact that it was 'clear from the legislative debate surrounding passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment against state

action. . . whether that action was executive, legislative, or judicial.' There is simply no comparable legislative history respecting the LHWCA [the Longshoremen's Act]. Moreover, *Mitchum* plainly requires, in order for the expressly authorized exception to be invoked, that 'an Act of Congress must have created a specific and a uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated in the federal court if the federal court was not empowered to enjoin a state court proceeding. *Id.* 92 S.Ct., at 2159." (Emphasis added.)

In short, Congress saw such state judges as part of the problem in *Mitchum*; but just as there is simply no comparable legislative history respecting the Longshoremen's Act, neither is there any respecting ERISA. When ERISA was passed, Congress did not see personal prejudice of state court judges as part of the problem. The *Mitchum* exception is not applicable because its rationale is not. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Chick Kam Choo v. Exxon Corp.*, ____ U.S. ____, 108 S.Ct. 1684 (1988); *Amalgamated Clothing Workers v. Richmand Bros.*, 348 U.S. 511 (1955); *Weber v. Anhauser-Busch, Inc.*, 348 U.S. 468 (1955); *Atlantic Coast Line R.R. Co. v. The Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Surely, the *Mitchum* decision is not to be extrapolated here by illusory analogy; implied exceptions based on *Mitchum* can only be supported by such extraordinary Congressional concern, and almost *in haec verba*, "judges who do not hear." Also in *Mitchum* there was a claim that there would be baseless, repetitious suits used as a weapon to violate Constitutional rights; no such claim is made here. Compare *Pennzoil Co. v. Texaco Inc.*, 107 S.Ct. 1519 (1987).

In *Vendo Co.*, above at page10, the federal proponent of injunction sought to extrapolate the *Mitchum* rationale into

the field of anti-trust where the Clayton Act contains express authority for federal injunctions. This Court held, and we believe that it was a holding on this particular point, that since there was only one state suit, not a repetitious series, there was neither express nor implied authority in the Clayton Act to enjoin the state case:

> "The Anti-Injunction Act, a fixture in the federal law since 1793, would then be a virtual deadletter whenever the plaintiff seeks an injunction under a federal injunctive statute. Whether or not the state proceeding could be enjoined would rest solely upon the traditional principles of equity and comity."

So the *Mitchum* decision offers no aid to Mr. Felton in his attempt to get around the Anti-Injunction Act. This prong of his pincher has been blocked. The only thing left is the injunctive provisions of ERISA itself.

ERISA'S INJUNCTIVE PROVISIONS CREATE NO EXCEPTION HERE TO THE ANTI-INJUNCTION ACT

After LOCA's plan was kicked off, Mr. Felton got himself employed as a claims-processor for LOCA's plan. He claims that ERISA had so glorified claims-processing ("Was your tonsillectomy really necessary?") that this makes him an ERISA fiduciary and that for some reason we must sue him under ERISA for this acturarial malpractice on his part although it has absolutely nothing to do with him claims-processing.

We denied that the ERISA statute so glorifies a claims-processor's job to the extent that he becomes an ERISA fiduciary simply as a result of processing claims. But claims-processor, glorified or common, we insisted that our claim

was not against Mr. Felton wearing his claims-processing hat, but against him wearing his actuarial and broker's hat; as such, ours is merely a proprietary claim against an insurance broker and actuary having nothing to do with ERISA jurisdiction.

Before turning to the ERISA provision for injunctions, we would test our theory by hypothesis: Suppose Mr. Felton had been a total stranger to LOCA's plan; suppose that he was not a claims-processor nor did he perform any other function for it; suppose one day he walks into LOCA's ERISA trust office with a sawed-off shotgun and takes all of the ERISA money out of the big ERISA safe there and flees; LOCA then sues Mr. Felton in state court in a civil action for conversion of this money, admittedly ERISA trust funds; does such a proprietary suit invoke ERISA's special exclusive jurisdiction?

If not, and surely not, let us add this element; suppose that he is a total stranger to LOCA's plan except that he processes claims for it; he is a daily employee of the ERISA plan for that purpose; suppose one morning he comes to work but instead of sitting down and processing claims he pulls a sawed-off shotgun out from under his raincoat and at gunpoint takes the LOCA ERISA funds out of the big LOCA ERISA safe in the LOCA ERISA office and flees; does this additional fact, that he is a claims processor for the plan, make the plan's civil suit against him for the conversion of the same money an ERISA case of exclusive jurisdiction? Surely, the question answers itself in the negative.

In the actual case, Mr. Felton has financially ruined the LOCA trustees and their ERISA trust through his actuarial malpractice and his careless insurance procurement, through his failure to get proper, adequate coverage as an insurance broker before the plan was kicked off, and his failure to give

sound actuarial consultation, just as surely as he could ruin the LOCA plan by robbing it at gunpoint if all the ERISA funds were kept in the big ERISA safe in the ERISA office.

Obviously, LOCA's claim for Mr. Felton's malpractice is just as much a proprietary suit as LOCA would have for his hypothetical robbery.

But this point we tried to get across below in vain. Nobody would listen. And nobody would give us a chance to make a record of it although our first alternative defense was a denial that our state suit was an ERISA case.

The injunctive provision of ERISA is 29 USC 1132(a)(3):

> "A civil action *may* be brought . . . by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan; . . ."
> [Emphasis added.]

The plain meaning of this injunctive provision shows that it is not applicable here. A malpractice claim is a proprietary action whether it is against a claims-processor or a true ERISA fiduciary; he is just sued under his other hat as actuary and broker.

LOCA could have done it the other way around: it could have let all the hospitals' patients sue it and the trustees; obtain judgment against it and the trustees; seize and sell their property; and then LOCA could turn to sue Mr. Felton for indemnity for his malpractice. Surely that would not be

an ERISA claim. This is a proprietary action by the trustees, not against them; there is no claim that Mr. Felton is a fiduciary who made bad or fraudulent investments; no equitable relief of any type is sought; no action "to enjoin any act or practice which violates any provision of this subchapter of the terms of the plan"; this is just a plain damage suit that has nothing to do the ERISA's injunctive provisions.

Moreover, and what is very important, this is *NOT* an attack upon the corpus of an ERISA trust. The trustees are not trying to get money out of the trust; they are trying to get damages out of Mr. Felton for his malpractice that injured the trust, his malpractice that occurred before the trust was formed but later did it damage; and whoever may be the owner of these damages is none of Mr. Felton's business; it is presumed that the trustees will make the proper application of them. (The trust has fallen in, *functus officio*; the only thing left is that the banks are about to fall upon the trustees' necks to get their personal notes paid. Mr. Felton's legal sleight of hand was never that too many people had sued here; but simply that they had sued in the wrong court.)

Mr. Felton cited below *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2nd Cir. 1983) cert. d. 104 S.Ct. 148; cert. dismissed 104 S.Ct. 26.

This citation is certainly strange comfort to Mr. Felton, since the case supports LOCA almost to the very facts. In *Pressroom Unions*, the plan sued insurance consultants [Mr. Felton's counterpart] *purportedly under ERISA jurisdiction* and essentially for their chiselling as insurance consultants [instead of the carelessness of Mr. Felton]; but the plan's suit was dismissed for *want of standing* and *thus want of*

ERISA jurisdiction because it was simply a proprietary claim; the Second Circuit held at page 893:

> Affording plans a power to sue does not, however, imply that they may bring actions under ERISA; it merely authorizes suits to be brought by funds in other situations where there would properly be jurisdiction. For example, if a fund became involved in a *contract dispute*, and wishes to pursue a state law contract claim, Section 1132(d)(1) [the ERISA sue-clause for proprietary claims] would allow the fund to bring such an action in its own name. [Emphasis added.]

This sue-clause, 29 USC § 1132(d)(1) is typical and provides:

> An employee benefit plan may sue or be sued under this subchapter as an entity.

A sue-clause in itself creates no federal question for jurisdiction. *Bankers Trust Co. v. Texas & Pacific R.R. Co.*, 241 U.S. 295 (1916).

This sue-clause merely entitles an ERISA plan to sue or be sued on proprietary claims. Subject or object, ERISA plans become involved in such suits as daily fare without invoking the special exclusive ERISA jurisdiction.

Likewise, in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), an ERISA plan or ERISA beneficiaries sued under ERISA, claiming special ERISA jurisdiction; they sued a lawyer for essentially professional malpractice; the Ninth Circuit dismissed the case for lack of jurisdiction since it was, again, merely a proprietary claim for state court under the sue-clause. (The plaintiffs complained that the lawyer's tardiness

had caused the ERISA plan to lose a lot of money, in the form of contributions that should have been paid into the plan but were not, because he waited too long to sue.)

TWO HATS

But Mr. Felton says his case is different; that he was also a claims-processor for the LOCA plan. We skip, for the moment, the question whether such clerical decisions as whether to pay for a tonsillectomy is such a significant decision that ERISA glorifies a claims-processor to the point that he is an ERISA fiduciary under that statute (any decision of Mr. Felton could be overridden by the trustees). Claims processor, common or glorified, or no claims-processor, the suit is not against Mr. Felton for negligence in claims processing; there is no count or theory on that; he is not being sued here with his claim processing hat on; he is being sued as an actuary who is guilty of malpractice that broke the ERISA plan; he is being sued on a proprietary claim against him with his actuarial hat on.

That ERISA parties may wear two hats, one invoking ERISA jurisdiction, the other not, was decided by the Circuit Court in *Sommers Drugstores Company Employee Profit Sharing Plan v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), cert. d. 107 S.Ct. 884, 1298. In the *Sommers* case, an ERISA plan brought suit against certain corporate directors who were also participants in that same ERISA plan; the plan alleged that the corporate directors were guilty of securities fraud in the purchase of assets (stock shares) *from that same ERISA plan*. (The defendants were also ERISA fiduciaries by virtue of their powers in connection with ERISA trusts.) The District Court held that ERISA preempted this claim of securities fraud against the corporate directors. The Fifth Circuit reversed this ruling, holding that the claim was not an ERISA claim but merely a proprietary claim that did not invoke ERISA jurisdiction;

the basis of the proprietary claim was a stockholder's claim that it (the ERISA Plan) was a victim of securities fraud in the purchase of stock from it, page 1468:

> "That in a case such as ours the [corporate] director happens also to be a plan fiduciary in the [ERISA] shareholder or benefit plan, has nothing to do with a duty owed by the director to the shareholder [not to commit securities fraud]. As director, the individual owes a duty defeined by state laws to the corporate shareholders *including the plan*; as fiduciary, the individual owes a duty *defined by ERISA* to the plan and its beneficiaries. Thus the state law does not affect relations between the ERISA fiduciary and the plan or plan beneficiaries as such; it affects them in their *separate capacities* as corporate director and shareholder."
> [Emphasis added.]

In short, the parties in *Sommers Drug Stores* wore two hats: as ERISA hat and a proprietary hat; and both plaintiffs and defendants were ERISA fiduciaries under one but not under the other.

So under these two cases, *Pressroom Unions* and *Sommers Drug Stores*, if LOCA had filed this proprietary suit for the malpractice of Mr. Felton in federal court instead of state, claiming ERISA jurisdiction, the case would have to be dismissed for want of such exclusive jurisdiction because the suit would obviously be a proprietary claim.

What does Mr. Felton think the sue-clause was put in ERISA for; a mere ornament?

We have no complaint against Mr. Felton as a claims-processor; he did not pay for a tonsillectomy too many; that is not part of our suit, never has been, never will be; LOCA has but two complaints–actuarial mistakes and insurance-broker mistakes; the expert witnesses that LOCA will send to the stand in this case are not claims-processors but actuaries and insurance consultants.

JUDICIAL ADMINISTRATION

It is a valid concern of judicial administration to consider that if this claim is pronounced and ERISA claim, then every time a plan sues on any proprietary matter, the parties will have to march right into the crowded federal courts; if the stationery supplier makes a mistake in the stationery, have to sue him in federal court since his claim has become one of exclusive federal jurisdiction.

This theory of Mr. Felton's, that since he was a claims-processor this case has to be in federal court, is just some expedient afterthought after the case has been in state court for years.

CASES ABOUT DIRECT ATTACKS ON THE TRUST-CORPUS OF ERISA PLANS ARE NO HELP TO MR. FELTON

Mr. Felton cites cases about the alienation, voluntarily or involuntarily, of interests in ERISA funds. The law is that a beneficiary of an ERISA retirement plan generally cannot alienate his interest in the ERISA plan, either voluntarily or involuntarily. State cases attempting to accomplish this are a direct attack upon the ERISA trust-corpus. If such "invasion of the trust-corpus" were allowed, the trust funds may be dissipated beyond the ability of the trustees to recover them, an irreparable harm. These cases generally involve attempts at

seizure through garnishment by judgment creditors or by mothers with dependent children seeking support money. Without going into whether they are analytically right or wrong, it is obvious that any injunction is based on the historical equitable ground that it is to prevent irreparable damage to the trust-corpus. There is no chance of that here since the trust and trustees are suing for money, not giving it away. There is no irreparable damage, no direct attack upon the trust corpus.

In Mr. Felton's citation, *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2nd Cir. 1977), there was in effect an attempt to give the trust corpus away; Chase Bank as trustee of the ERISA plan sought to wind up the trust in state court because it had fallen in; the company funding the plan had been adjudicated bankrupt; Chase had received no directions for distribution in several years; so it decided to wind the ERISA plan up in state court and distribute [give the money away] to the beneficiaries; this in effect would be a "direct attack upon the trust corpus" leading to irreparable harm if the winding up was not proper. The Secretary of Labor filed for an injunction on the ground that winding up the ERISA trust was an activity that should be done, if at all, in federal court. In allowing the injunction to stand, the Second Circuit pointed out the well-settled rule that the Anti-Injunction Act does not apply in cases brought by representatives of the United States government such as the Secretary of Labor; the act "was not intended to hamstring federal agencies in the utilization of federal courts to protect federal rights." 558 F.2d 683.

In doing so, the Second Circuit was following this Court's instructions in *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971) which held that the Anti-Injunction Act does not apply to government officials and representatives.

In Mr. Felton's citation, *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), there was the typical attempt at involuntary alienation through garnishment by a judgment creditor of a beneficiary's interest in an ERISA trust-corpus; the Sixth Circuit approved a federal court injunction against the state court "when a district court finds that an action in the state court would have the effect of making it impossible for a fiduciary of a pension plan to carry out its responsibilities under ERISA, the anti-injunction provisions of §2283 do not prohibit it from enjoining the state court proceedings." Page 459.

The short answer here is that the suit by the LOCA trustees to recover money will not "have the effect of making it impossible for a fiduciary of a plan to carry out its responsibilities under ERISA."

Whether these types of cases, concerning direct attacks upon the trust-corpus, are right or wrong in either their use of the ERISA injunctive provision or in their use of *Mitchum*, above page 9, they are certainly distinguishable from the case at bar.

In Mr. Felton's citation *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 322 (2nd Cir. 1985), aff'd. sub. nom., *Roberts v. Burlington Industries*, 477 U.S. 901 (1986), a state official, "the New York State Commissioner of Labor," was enjoined from enforcing a payout order she had issued against Burlington to pay out money from the corpus of an ERISA trust because of supposed rights under state law which were preempted by ERISA; against, an attack upon the corpus of an ERISA trust. If the money was paid out, it might never be recovered, causing irreparable harm to the ERISA plan. The Second Circuit held among other things, at page 329, that the federal district court could properly enjoin the state administrative proceeding and

that such injunctions did not violate the Anti-Injunction Act "even assuming that the Anti-Injunction Act applies to administrative proceedings of the Industrial Board of Appeals." And it is settled that such an injunction against an administrative proceeding is not an injunction against a state judge nor a state court; the Anti-Injunction Act only applies to judges.

We forego Mr. Felton's citation of family support cases since state garnishment in those cases was allowed, at district level with no appeal.

NEITHER THE RECORD NOR THE LAW SUPPORTED THE SUMMARY JUDGMENT BASED ON THE ERISA TIME-BAR

Summary judgment of prejudicial dismissal was entered in the face of affidavits that clearly show that if this were an ERISA case there were equitable and legal defenses of (1) adoption of state tolling provisions and limitations and (2) that Mr. Felton, because of his conduct in hiding his malpractice, should be estopped from pleading limitation.

As a state claim sounding in contract LOCA's suit is not barred for ten years; as an indemnity claim, it did not start running until the trustees borrowed the money and paid the hospital bills; there can be no claim for indemnity until there is money paid out. This was well within every statutory period, state or federal. Case law from both the state and federal jurisdictions was provided to that effect.

LOCA also pleaded that commercial malpractice (professional negligence that does not do injury to body or property) does not create a cause of action until there is commercial loss. Federal and state cases were cited on this point.

These matters still await the plenary merit hearing which they are entitled to if this is an ERISA case. (It is not, but we are not presumptuous.)

THE CONSTITUTIONAL ASPECTS

Mr. Felton's compassionate contention is that LOCA has ERISA rights but no ERISA remedy; that LOCA's case is an ERISA suit, but that ERISA preempts any state remedy without substituting an ERISA claim for his malpractice; a simple argument of pure confiscation: that the malpractice claims are an ERISA case, but since ERISA does not provide any damages because of malpractice (but nevertheless preempts malpractice claims) then regardless of the merits, LOCA is entitled to nothing even if it had filed timely in federal court. One moment we are entitled to damages under state law, the next moment we are not, neither in state nor federal court. LOCA, in the alternative, pleaded the Fifth Amendment of the Constitution of the United States; that if ERISA resulted in this confiscatory preemption, then LOCA was denied its rights of due process and equal protection.

JURY

LOCA also pleaded that its claim was based on tort which entitled it to a jury under the Seventh Amendment. (LOCA brought all these Constitutional questions up at the earliest possible moment by filing a written motion which was granted by the district court to note these Constitutional issues.)

Mr. Felton says that such a claim is not entitled to a jury because it is an equitable suit; whoever heard of a fist fight invoking equity jurisdiction?

SUMMARY

Judge Broussard can decide all of these points here as competently as most any other judges; he can certainly give us our day in court for a merit hearing on (1) the jurisdictional point and (2) on the cause.

This case should go back to state court for an orderly adjudication. This way, review by this Court of the jurisdictional question supposedly raised by ERISA could be saved until it is determined that there will actually be a need for such review.

This federal suit can be summed in a word: it is a trick and paradoxically it is a trick upon the federal courts, not the state, with all due respect and cordiality to the dicta of the Circuit Court.

Judge Broussard is neither half-mad nor half-witted; he is not lazy, nor indifferent, nor stupid, nor ignorant, nor disinterested, nor biased, nor prejudiced, nor corrupt, nor perverse; he is no mental midget, no moral imbecile; and he is not about to violate the oath he took that he would do a standard job in adjudicating the cases before him. That Mr. Felton might perceive him as not as bright, clever nor sophisticated as some other judges, state or federal, is no excuse for what Mr. Felton tried to do here.

Mr. Felton's assertion that he was hired "as a fiduciary for the Plan" (his page 5) is incorrect if not false if intended as a statement of fact; (actually he tried to state in writing that he was *not* an ERISA fiduciary; again, it is the actual facts that control, not what either party tried to say in the papers whether in their pleadings or their contracts; Mr. Felton would aggrandize himself as a "highway beautification engineer" although his sole task was to pick up beer

cans along the right-of-way). His assertion that LOCA sued him for "failure to provide for adequate Plan funding (his page 6) is true only if it means that LOCA sues him for actuarial malpractice in his recommendations of premium rates and these happened before there was any plan; he could only recommend such rates, not command them; he had no power whatever to overrule the trustees on anything.

CONCLUSION

Mr. Felton has been playing games with the courts below; he seeks to play another here. He is not really concerned about the state judge; but he sorely wants to stay away from that state jury as far and as long as he can. The last thing he wants to hear is, "They are coming in." So he jumps from one courthouse to another; then he races up an appellate ladder; he slyly bemuses us that the sue-clause is a meaningless ornament; that a common case of malpractice for a jury is really a suit in equity for a federal judge; he tries to turn ERISA inside out: a case by ERISA fiduciaries becomes by some legal magic a case against ERISA fiduciaries; all claims become ERISA claims.

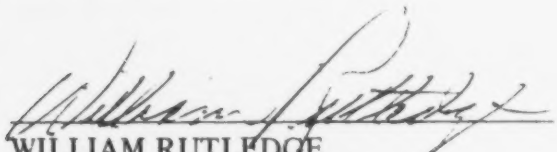
He has silently snickered at the courts below and hopes to do so here. For the question still stands, and he has not answered it, and he cannot answer it. Why did he not call upon the state court to rule upon the jurisdictional point, after an adequate merit hearing of the jurisdictional facts, the very jurisdictional point that he raised in his response to the state court's summons; he files his plea to the jurisdiction of the State Court and then after several years of hard work and discovery there on the part of everybody he dashes off without a word of warning in the middle of the night to federal court with his specious claim that he is entitled to a federal injuction of our state suit.

He talks of ready access; but does he really believe in it; he has had it for three years in state court. Now he wastes more time trying to run a common proprietary claim up a federal chain of exclusive jurisdiction. State or federal, use of either chain in a given case may waste the same amount of time, or more.

Mr. Felton is indeed a very bright fellow when it comes to jurisdiction; too bad he was not as clever with his actuarial calculations of probability and permutations; if he had been, none of us would be in either court now, state or federal.

Review should be denied now and forever.

Respectfully submitted,



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APPENDIX

APPENDIX A

ISSUES AND QUESTIONS RAISED:

(1) Who should decide whether the suit in state court was an ERISA suit?

> LOCA [Louisiana Oil field Contractors Association, its employee benefit trust and trustees] filed in state court before Mr. Felton [Gary Felton and his solely-owned company] filed his in federal. He lodged in state court an exception to its jurisdiction. Then, before ruling there he filed in federal court; he sought a declaration and an injunction to prevent the state court from deciding this question.

(2) Was there any equity in the bill of complaint for a declaratory judgment?

> Mr. Felton could have gotten the same declaration by simply moving his plea to the jurisdiction to ruling in state court so that the state court judge would decide it.

(3) Was there any inadequate remedy at law that would warrant a complaint being filed in federal court for a declaratory judgment?

(4) Was there any equity in the bill of complaint for injunction, when the Anti-Injunction Act clearly barred one if there were no exceptions created by ERISA?

> Mr. Felton could not allege that the state judge had ruled against him because he had not set his jurisdictional plea for hearing there.

(5) Did any of the exceptions in the Anti-Injunction Act apply because of the injunctive provisions of ERISA?

(6) Could the state suit be made an appendage of the federal by a federal court order that it be sent over and made a part of the federal record?

There had already been remand to the state court.

(7) Was Mr. Felton's remedy at law inadequate solely because he would have gone up through a state appellate chain to the United States Supreme Court, instead of up a federal, if the state court had ruled against him on the question of jurisdiction: whether the state suit was an ERISA case exclusively within federal jurisdiction?

(8) [If the state court should have decided the question of jurisdiction; and if the injunction violated the Anti-Injunction Act; and if there was no jurisdiction to bring the case up from state court to federal court a second time, then this appeal stops here: The federal case should be dismissed with prejudice and the parties be allowed to go on in state court, particularly after Mr. Felton discovered and litigated years in state court before he ever filed his federal suit.] But if not, then: Is this an ERISA case?

(9) Is LOCA now estopped from denying that its state suit is an ERISA suit because of ERISA allegations in it?

All ERISA allegations have been amended out of the state suit.

(10) Was Mr. Felton an ERISA fiduciary?

He had absolutely nothing to do with or about investments of trust assets in any form or fashion, directly or indirectly.

(11) If he was, did LOCA sue Mr. Felton as an ERISA fiduciary? Or, under the two-hats theory, as a consulting actuary?

He was guilty of malpractice in giving LOCA bad actuarial advice about the premiums to be charged for this hospital insurance. This caused the LOCA trust to go broke because of his bad actuarial consultation, nothing else. He gave the bad advice *before* the ERISA trust was formed, and before he did anything in the way of making administrative decisions as a third party administrator.

(12) Is there enough lawful evidence in the record to support the federal declaration; injunction; and judgment of dismissal of LOCA' s claims?

No oral testimony was taken in court. The record, though ten volumes long, does not contain a bit; this federal case has never been cried in open court.

(13) Was there any standing for either one of these suits, the state court suit or the federal court suit, to be brought under ERISA?

ERISA explicitly and completely specifies who has standing.

(14) If this is an ERISA case, has it been barred by limitation?

(a) Was Mr. Felton estopped to deny that the state case was sufficient to stop any statute of limitation?

He had the state case transferred to federal court as a valid ERISA case; and he prevailed on his pleadings when he did so. He now denies that state case satisfied the statute of limitations about filings.

(b) When did LOCA's cause of action accrue?

Among other damages, this is a case for an indemnity by Mr. Felton of LOCA for reimbursement of its outlay that it had to borrow because of Mr. Felton's bad actuarial advice; the borrowed money was paid out on claims within the period of limitation.

(c) Does the ERISA statute adopt (except for the question of actual or constructive knowledge) the state scheme of tolling which tolls limitations when a case is filed in the wrong courthouse if there is summons or citation within the prescribed period?

(d) If not, should there be an equitable adoption in this case in view of the years of litigation and discovery in state court?

(e) Is Mr. Felton estopped to plead limitation by his conduct and representations to LOCA?

He caused LOCA to believe that everything was all right and then caused it to believe that, if not, LOCA would be reimbursed money, anyhow, from the reinsurer.

(f) Did the state court suit amount to a factual commencement of an action under the ERISA statute that would toll ERISA prescription?

(15) If LOCA's purported ERISA claim has not been barred by limitation or prescription, does ERISA provide a remedy against Mr. Felton?

(16) If not, is ERISA in this case unconstitutional in its application because of violation of the Fifth Amendment for unequal protection or denial of due process, in that LOCA's claim for malpractice, which would exist but for ERISA, has been condemned by ERISA and taken from LOCA without giving LOCA anything in return, *quid pro quo* by way of substitute remedy or substitute defendant.

(This Constitutional question was raised below, explicitly, in writing, and at the earliest moment.)

Supreme Court, U.S.
FILED
DEC 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2117

In the Supreme Court of the United States

OCTOBER TERM, 1989

INCOME SECURITY CORPORATION, INC., ET AL., PETITIONERS

v.

LOUISIANA OILFIELD CONTRACTORS ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The district court enjoined a state court action against two alleged fiduciaries of an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), and the court of appeals reversed on the ground that the injunction was prohibited by the Anti-Injunction Act, 28 U.S.C. 2283. The question presented is whether the entry of the injunction was contrary to that Act, or whether it fell within the exception for injunctions "expressly authorized by Act of Congress."

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2117

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondent Louisiana Oilfield Contractors Association established a group health plan in 1981. Under the Plan, participating employees of companies that belonged to the Association and contributed to the Plan's trust fund obtained reimbursement for medical expenditures. Petitioner Income Security Corporation, Inc., whose president is petitioner Gary Felton, contracted to perform administrative services for the Plan. Among their duties, petitioners were to estimate the cost of claims that would be filed in the Plan's first year and obtain adequate stop-loss insurance to reimburse the Plan after it paid claims beyond a certain dollar amount (the "aggregate attachment point"). The amount the Plan charged participating employers and

employees was determined by adding the anticipated claims that the Plan itself would pay, the cost of stop-loss insurance, and anticipated administrative costs. Pet. App. 7a-10a.

In 1982 and 1983, the Plan experienced a mounting deficit due to its failure to charge and receive a sufficient amount of money from participating employers and employees. The Plan's trustees blamed petitioners for the underfunding, and in 1984 commenced a civil action against them in state court.[1] The Plan alleged that, because of the underfunding, it had been unable to pay all claims. In addition, the Plan claimed that it had been unable to pay enough claims to reach the aggregate attachment point, and therefore the stop-loss insurance had not taken effect. The Plan's complaint alleged various contract and tort claims under state law. In early 1986, the Plan amended its complaint to add an allegation that petitioners had incurred liability as fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA). Pet. App. 10a-11a, 14a-15a.

In July 1986, petitioners brought this suit in federal district court against the Plan and its trustees. They asked the court to declare all the rights, duties, and obligations of the parties, and to stay all further state court proceedings on the ground that the state court lacked jurisdiction. Pet. App. 15a.[2] More specifically, petitioners contended that the

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[1] Initially, there were two civil actions: one by the Plan and affiliated parties and another by Dwight W. Andrus Insurance, Inc., which had helped formulate the Plan and had engaged petitioners to assist in that process. The state court defendants included petitioners, Harbor Insurance Co. (the reinsurance agent), and US Benefits, Inc. (the underwriting manager and intermediary for Harbor in connection with the reinsurance agreement). The state court consolidated the two actions. Pet. App. 11a.

[2] After the federal court action commenced but before the district court ruled, the Plan again amended its state court complaint to delete all references to ERISA. Pet. App. 15a.

Plan's state law claims were preempted by 29 U.S.C. 1144(a), which states that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." With respect to the Plan's ERISA claim, petitioners noted that 29 U.S.C. 1132(e) provides that the federal courts have exclusive jurisdiction over claims alleging breaches of fiduciary duties.[3]

The district court held in favor of petitioners. Pet. App. 4a-42a.[4] It concluded (*id.* at 38a) that "[t]he restated petitions filed in state court * * * essentially allege breaches of fiduciary duty owed to an ERISA-governed employee benefit plan by entities engaged to perform contractual services for that plan. To the extent based on state law, these claims are clearly preempted. To the extent they are based on federal law, the federal courts have exclusive jurisdiction over the matter." The court issued a declaration to that effect (*id.* at 39a-40a) and, without consideration of the Anti-Injunction Act, 28 U.S.C. 2283, enjoined continuation of the state court proceedings (Pet. App. 41a).[5]

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[3] State and federal courts have concurrent jurisdiction over claims for employee benefits, but the federal courts have exclusive jurisdiction over other claims arising under ERISA. 29 U.S.C. 1132(e).

[4] The district court based its jurisdiction primarily on 29 U.S.C. 1132(a)(2), which provides that parties may seek "appropriate relief under section 1109" (which governs "liability for breach of fiduciary duty").

[5] In a subsequent decision (Pet. App. 43a-54a), the court further declared the rights and liabilities of the parties. It held that the claim against petitioners for breach of their fiduciary duties under ERISA was barred by the three-year statute of limitations in 29 U.S.C. 1113(a)(2). Pet. App. 53a. Specifically, the court determined that the trustees had actual knowledge of petitioners' alleged breach of their fiduciary duties at least by May 1983, when the trustees met to discuss the Plan accountant's finding of serious underfunding, since the trustees placed the blame for the underfunding on petitioners at that

The court of appeals, in an unpublished decision, vacated and remanded. Pet. App. 1a-3a. It concluded that "the district court correctly held that subject-matter jurisdiction was vested in that court to the exclusion of any state court." *Id.* at 2a. However, the court found that the district court had erred by enjoining the state court proceeding. The court of appeals based its decision on *Texas Employers' Ins. Ass'n* v. *Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1932 (1989), which held, in the context of the Longshore and Harbor Workers' Compensation Act, that "the Anti-Injunction Act * * * bars a federal district court from enjoining a pending state court action even where, as here, 'federal preemption or interference with a federally protected right * * * is unmistakably clear.' " Pet. App. 2a (quoting 862 F.2d at 504). Furthermore, again relying on *Texas Employers' Ins. Ass'n*, the court ruled that declaratory relief was inappropriate because it had the same effect as an injunction on the state court proceedings. Pet. App. 2a-3a.

DISCUSSION

1. The court of appeals correctly held that the district court erred by enjoining the state court action. The Anti-Injunction Act, 28 U.S.C. 2283, provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The

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time. Pet. App. 48a-50a. The court further determined that the filing of the state court actions did not toll the running of the limitations period, and that the trustees could not invoke the principle of equitable tolling because petitioners had not induced them to sleep on their federal rights. *Id.* at 50a-53a.

Act,[6] which dates in some form to 1793, is "a necessary concomitant of * * * a dual system of federal and state courts," and represents "a general policy under which state proceedings 'should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme] Court.' " *Chick Kam Choo* v. *Exxon Corp.*, 108 S. Ct. 1684, 1689 (1988) (quoting *Atlantic Coast Line R.R.* v. *Locomotive Engineers*, 398 U.S. 281, 287 (1970)). "By generally barring such intervention, the Act forestalls 'the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.' " *Chick Kam Choo*, 108 S. Ct. at 1689 (quoting *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630-631 (1977) (plurality opinion)).

The Act thus expresses "a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 516 (1955). Moreover, "the exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.' " *Chick Kam Choo*, 108 S. Ct. at 1689 (quoting *Amalgamated Clothing Workers*, 348 U.S. at 514). "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R.R.*, 398 U.S. at 297; see also *Amalgamated Clothing Workers*, 348 U.S. at 514 ("Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.").

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[6] Congress adopted the present wording of the Act when it enacted Title 28 of the United States Code in 1948. See *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 514-515 (1955).

Petitioners contend that the stay issued by the district court in this case falls into the exception to the Act for injunctions "expressly authorized" by "Act of Congress." They rely on *Mitchum* v. *Foster,* 407 U.S. 225, 237 (1972), where the Court noted that the exception requires neither specific reference to the Anti-Injunction Act nor express authorization of an injunction of state court proceedings. Rather, the Court said, "[t]he test * * * is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity could be given its intended scope only by the stay of a state court proceeding." *Id.* at 238.

As an initial matter, it is clear that the exception for injunctions "expressly authorized" by "Act of Congress" does not apply merely because the Plan's state law claims are preempted and the federal courts have exclusive jurisdiction over its ERISA claim. This Court assumed that the state court lacked jurisdiction in *Amalgamated Clothing Workers* (348 U.S. at 514), but nevertheless held that the Anti-Injunction Act barred an effort to stay the state proceedings. In such a case, the Court stated, the proper remedy is for the defendant to argue to the state court that it lacks jurisdiction. *Id.* at 518. Likewise, in *Atlantic Coast Line R.R.* the Court reiterated that the Anti-Injunction Act cannot be evaded "merely because [the state] proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear." 398 U.S. at 294. Again, it explained that the proper course is to seek vindication of the federal rights in the state courts, subject to ultimate review by this Court. *Id.* at 296; accord *Chick Kam Choo,* 108 S. Ct. at 1691 ("when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court"). Thus, even a broadly preemptive statute such as ERISA

can "be given its intended scope" other than "by the stay of a state court proceeding" (*Mitchum*, 407 U.S. at 238) since the state courts can decide that they lack jurisdiction.[7]

ERISA is therefore not analogous to 42 U.S.C. 1983, the statute at issue in *Mitchum*. In that case, the owner of a bookstore, relying on Section 1983, sought to enjoin state court proceedings seeking to close down his store as a nuisance. The Court held that injunctions against state court actions are permissible under Section 1983, despite the Anti-Injunction Act, since Section 1983 had been enacted specifically because Congress doubted the willingness and ability of state courts to protect federal rights. The Court stressed that "[p]roponents of the legislation noted that state courts were being used to harass and injure individuals, either because [they] were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." 407 U.S. at 240.[8] The legislative history of ERISA demon-

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[7] This Court did hold, in *Bowles* v. *Willingham*, 321 U.S. 503, 510-511 (1944), that a wartime grant of exclusive jurisdiction to a particular federal court, coupled with statutory authority to grant injunctive relief, constituted an exception to the prohibition of the Anti-Injunction Act. We do not believe that the *Willingham* decision is controlling here, however; that case was decided before *Amalgamated Clothing Workers, Atlantic Coast Line*, and *Vendo Co.*, and the state court action in that case—to enjoin the issuance of a rent order under the Emergency Price Control Act—was a far more direct challenge to authority conferred only on a federal court than the state court action here.

[8] The Court quoted a Senator who had stated that " '[i]f the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate,' " and a Representative who had supported Section 1983 because " '[a]mong the most dangerous things an injured party can do is to appeal to justice.' " 407 U.S. at 240-241 (quoting Cong. Globe, 42d Cong., 1st Sess. 653 (1871) (statement of Sen. Osborn) and *id.* at App. 78 (statement of Rep. Perry)).

strates no comparable doubts. Indeed, Congress gave concurrent jurisdiction over benefit claims to the state courts. It reserved cases involving breaches of fiduciary duty to the federal courts only because it concluded that, on account of "the interstate character of employee benefit plans," it was "essential to provide for a uniform source of law" to govern fiduciaries. S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973).

Furthermore, contrary to petitioners' suggestion (Pet. 15), authority to enjoin state court proceedings is not conferred by 29 U.S.C. 1132(a)(2) or (a)(3). Section 1132(a)(3) expressly authorizes fiduciaries of employee benefit plans to seek "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan." Thus, Section 1132(a)(3) is intended, for example, to allow a fiduciary to obtain an injunction ordering an employer to make payments in accordance with the terms of the governing plan. Petitioners did not seek such an injunction. Rather than seeking to remedy a violation of the statute or a term of a plan, they seek to enjoin a state court action against them. "Conspicuously absent from the language of this ERISA injunction provision is any suggestion of its use by federal courts against state tribunals." *United States Steel Corp. Plan for Employee Ins. Benefits* v. *Musisko,* 885 F.2d 1170, 1177 (3d Cir. 1989).

Moreover, in *Vendo Co.* v. *Lektro-Vend, supra,* the Court rejected the suggestion that Section 16 of the Clayton Act, 15 U.S.C. 26, which authorizes injunctive relief for violations of the antitrust laws, overrides the Anti-Injunction Act, even though the plaintiff there alleged that the state court action was brought as part of an anticompetitive conspiracy. The plurality explained that if Section 16 were construed to authorize injunctions of state court actions, then the Anti-Injunction Act "would be

completely eviscerated since the ultimate logic of this position can mean no less than that virtually *all* federal statutes authorizing injunctive relief are exceptions to § 2283." 433 U.S. at 636 (plurality opinion).[9] In this case, in contrast to *Vendo,* petitioners' primary complaint is not that the Plan's state court action was itself part of a scheme to violate ERISA; petitioners stress their contention that the Plan's state law claims are preempted and that the state court lacks jurisdiction over the Plan's ERISA claim. Petitioners' claim that Section 1132(a)(3) overrides the Anti-Injunction Act is therefore weaker than the claim that was rejected in *Vendo,* and *Vendo*'s holding is fully applicable here.

Section 1132(a)(2), the provision on which the district court based its jurisdiction to grant declaratory relief (Pet. App. 36a), authorizes district courts to grant "appropriate relief" to remedy breaches of fiduciary duty. Petitioners do not seek to remedy such a breach; to the contrary, they seek to defend against an alleged breach of their duties by obtaining a declaration that the state court lacks jurisdiction. Accordingly, there is no basis for concluding that Section 1132(a)(2) authorizes declaratory relief in this case. That is particularly so since the declaratory relief they seek would have the effect of an injunction. In *California* v. *Grace Brethren Church,* 457 U.S. 393, 408 (1982), the Court stated, with respect to the Tax Injunction Act, 28 U.S.C. 1341, that "because there is little practical difference between injunctive and declaratory relief,

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[9] The concurring Justices in *Vendo* thought that a state court proceeding might be enjoined under Section 16 if the state court action itself was part of a " 'pattern of baseless, repetitive claims' that are themselves being used as an anticompetitive device." 433 U.S. at 644. The dissenters stressed the district court's finding that the Vendo Company had used "litigation as a method of harassing and eliminating competition." *Id.* at 654.

we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another." As the court of appeals concluded in *Texas Employers' Ins. Ass'n,* that logic applies in full to the Anti-Injunction Act. 862 F.2d at 507. The court of appeals therefore correctly concluded (Pet. App. 2a-3a) that declaratory relief should not be granted in this case.[10]

Petitioners also complain (Pet. 15-19) that although ERISA authorizes "ready access to the Federal Courts" (29 U.S.C. 1001(b)), that access has been denied to them. But in the future, persons like petitioners will have no difficulty removing cases such as this to federal court. In *Metropolitan Life Ins. Co.* v. *Taylor,* 481 U.S. 58, 67 (1987), the Court held that a claim for ERISA benefits was removable even though the complaint purported to raise only state law claims. In reaching that conclusion, the Court emphasized a statement in the Conference Report that actions seeking benefits " *'are to be regarded as arising under the laws of the United States.'* " 481 U.S. at 65 (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974)). Since Congress also believed that it was "essential to provide for a uniform source of law" with respect to matters affecting fiduciary responsibility (H.R. Rep. No. 533 at 17), it is clear that actions alleging breaches of fiduciary duties are also removable, whether or not the complaint alleges a violation of ERISA.[11] Thus,

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[10] The question whether Section 2283 applies to actions for declaratory relief is not discussed in the petition.

[11] At the time the Plan's state court action was filed, petitioners could not have removed it because the state court lacked jurisdiction and, under the derivative jurisdiction rule, removal was not allowed. Congress has subsequently amended 28 U.S.C. 1441 to permit removal to a federal court of an action that is within exclusive federal

a fiduciary who is sued in state court on account of an alleged breach of his duties may now remove that action to federal court.[12]

2. Although there is some disagreement in the lower courts, review by this Court is not warranted at this time. As an initial matter, contrary to petitioners' claim (Pet. 19-20), there is no conflict between the decision below and the decision in *Marshall* v. *Chase Manhattan Bank,* 558 F.2d 680 (2d Cir. 1977). The injunction in that case was sought by the Secretary of Labor, not by a private party, and the court, relying on this Court's holding in *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138, 146 (1971), said that "the general language of § 2283 [is] not intended to hamstring federal agencies in the utilization of federal courts to protect federal rights." 558 F.2d at 683. The *Marshall* decision is correct: the Anti-Injunction Act does not bar "a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting 'superior federal interests.' " *Mitchum,* 407 U.S. at 235-236; *Nash-Finch Co.,* 404 U.S. at 146; see also *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220, 225-226 (1957).

There is some tension between the decision below and the decision in *General Motors Corp.* v. *Buha,* 623 F.2d

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jurisdiction. See Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3(a), 100 Stat. 637, adding 28 U.S.C. 1441(e) (Supp. V 1987).

[12] Although petitioners could not have removed the Plan's action because it was filed before Congress revised the removal statute, they were not without a remedy—they could have moved for summary judgment on the ground that the state court lacked jurisdiction. That is the course that this Court has repeatedly directed parties such as petitioners to take. *Amalgamated Clothing Workers,* 348 U.S. at 518; *Atlantic Coast Line R.R.,* 398 U.S. at 294; *Chick Kam Choo,* 108 S. Ct. at 1691.

455, 458-459 (6th Cir. 1980), where the court held that the Anti-Injunction Act did not prevent a fiduciary of a pension plan from seeking to enjoin state court proceedings in which a judgment creditor sought to garnish the pension account of a participant in the plan. However, that case is not directly in conflict with the decision here. As the Third Circuit explained in *United States Steel Corp. Plan for Employee Ins. Benefits* v. *Musisko*, 885 F.2d 1170, 1178 (1989), it appears that the fiduciary in *Buha* was not a party to the state court garnishment action, which was brought against the bank that held the pension fund, and therefore could not raise its objection to garnishment in the state court. In that circumstance, it may be that ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1)—which prohibits the garnishment of pension accounts (see also 26 C.F.R. 1.401(a)-13)—"could be given its intended scope only by the stay of a state court proceeding." *Mitchum*, 407 U.S. at 238.[13] In any event, the facts of *Buha* are unlikely to recur. While it should have been clear to the judgment creditor even before the decision in *Buha* that it could not garnish a pension account, after that decision (which correctly held that the anti-alienation provision bars garnishment actions (623 F.2d at 460-463)), few creditors are likely to seek to invade such accounts.[14]

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[13] See *County of Imperial* v. *Munoz*, 449 U.S. 54, 59-60 (1980); *Hale* v. *Bimco Trading, Inc.*, 306 U.S. 375, 377-378 (1939) (exclusion from Anti-Injunction Act of "strangers to the state court proceedings").

[14] In *Guidry* v. *Sheet Metal Workers National Pension Fund*, No. 88-1105 (argued Nov. 29, 1989), the question presented is whether an exception to the anti-alienation provision should be inferred where a union treasurer embezzled from the union. It is undisputed in that case that the union could not garnish the petitioner's pension account merely because it is a judgment creditor; the respondent argues only that an exception is warranted in cases involving theft by union officers.

In *Gilbert* v. *Burlington Indus., Inc.*, 765 F.2d 320, 329 (2d Cir. 1985), aff'd, 477 U.S. 901 (1986), the court first "assum[ed] that the Anti-Injunction Act applies to administrative proceedings." It held that because common law causes of action are preempted by ERISA, a district court could nevertheless stay such a proceeding where the plaintiffs were seeking severance benefits from a plan subject to ERISA. 765 F.2d at 329. The court did not explain the basis for its ruling on the availability of an injunction, a ruling that is contrary to the decision below. However, as with *Buha,* we believe that the problem presented in *Gilbert* is unlikely to arise in the future. On appeal to this Court—in which the question presented was limited to the issue whether the court of appeals correctly held that ERISA preempts state law claims for employee benefits—the judgment of the court of appeals was affirmed. That affirmance, along with the more recent decision in *Pilot Life Ins. Co.* v. *Dedeaux,* 481 U.S. 41, 54 (1987) ("ERISA's civil enforcement remedies were intended to be exclusive"), makes entirely clear that the only remedies available in cases involving employee benefits are those provided in ERISA itself. Accordingly, plaintiffs should not seek to bring state law claims in cases involving employee benefit plans subject to ERISA and, if they do, the state courts can be trusted to hold them preempted. Moreover, under *Metropolitan Life Ins. Co.* v. *Taylor, supra,* a defendant could choose to remove such a case from state court.

The Third Circuit's recent decision in *Musisko* also counsels against review by this Court. *Musisko* was the first decision by a court of appeals that considered in detail the question presented here—the court in *Gilbert* devoted only one paragraph to the issue, and the court in *Buha* failed to consider this Court's decisions in *Amalgamated Clothing Workers* and *Atlantic Coast Line R.R.*

and did not have the benefit of the decision in *Chick Kam Choo*. The Third Circuit correctly held that a district court may not enjoin a state court proceeding on the ground that the plaintiffs' claims are preempted by ERISA. 885 F.2d at 1175-1178. In the unlikely event that questions such as the one presented here arise in the future, we think the lower courts will be guided by the analysis in *Musisko*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00650